SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.,

PETITIONERS,

vs.

THE TRAVELERS INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Western District of Louisiana in the case of Calbeck v. The Travelers Insurance Company, et al.		
Complaint	1	1
Exhibit "A"—Compensation order-supplemental findings of fact	13	10
Exhibit "B"—Compensation order-rejection of claim	19	14
Exhibit "C"—Compensation order-modification of award	23	18
Answer of McGuyer, et al.	26	21
Motion to dismiss by Caldeck	30	23
Motion to dismiss by McGuyer, et al.	30	24
Excerpts from official report of proceedings before the Deputy Commissioner	32	25
Opinion, Hunter, J.	57	38
Order granting summary judgment and dismissal of complaint	61	41
Notice of appeal	62	41
Clerk's certificate (omitted in printing)	75	42
Proceedings in the United States Court of Appeals for the Fifth Circuit		

	Original	Print
Argument and submission	76	42
Opinion, Brown, J.	77	43
Judgment	94	56
Clerk's certificate (omitted in printing)	97	56
Record from the United States District Court for the Eastern District of Louisiana in case of Donovan v. Avondale Marine Ways, Inc.		
Complaint to enjoin compensation order under Longshoremen's and Harbor Workers' Compensation Act	2	56
Answer of Minus Aizen	6	60
Motion of defendant, Minus Aizen, for a summary judgment	10	62
Plaintiff's motion for summary judgment under Rule 56	11	63
Proceedings before the Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation—Case No. 434-328	12	64
Claimant's Exhibit #1—Employees's claim for compensation	31	75
Respondent's Exhibit "A"—Answer of employer or insurance carrier to employee's claim for compensation	34	78
Respondent's Exhibit "B"—Letter dated November 29, 1958 from Avondale Marine Ways, Inc., to Bureau of Employees Compensation	36	80
Respondent's Exhibit "C"—Employer's first report to Deputy Commissioner of accident or occupation disease	37	81
Respondent's Exhibit "D"—Job status report	39	84
Deputy Commissioner's Exhibit #1—Letter dated November 17, 1958 to Avondale Marine Ways, Inc.	41	85
Deputy Commissioner's Exhibit #2—Stipulation of fact	42	86
Compensation award—Award of compensation	48	91
Minute entry of hearing on motion to dismiss and for summary judgment	54	95
Order granting motion to dismiss complaint and for summary judgment	55	95
Judgment	56	96
Notice of appeal	56	96
Clerk's certificate (omitted in printing)	60	97
Proceedings in the United States Court of Appeals for the Fifth Circuit:		
Argument and submission	61	97
Opinion, Brown, J.	62	98
Judgment	65	99
Clerk's certificate (omitted in printing)	69	100
Order extending time to file certiorari	70	100
Order allowing certiorari	71	101

1 (Filed endorsement omitted)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 7873

THE TRAVELERS INSURANCE COMPANY, *et al.*,

v.

C. D. CALBECK, DEPUTY COMMISSIONER, *et al.*

Complaint

To the Honorable Judge of Said Court:

Now Comes The Travelers Insurance Company and Levingston Shipbuilding Company complaining of C. D. Calbeck, Deputy Commissioner, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer, and for cause of action would respectfully show the Court the following:

1.

This complaint is filed by plaintiffs for the purpose of reviewing and setting aside as not in accordance with law an order for the payment of compensation made by the defendant Deputy Commissioner, C. D. Calbeck, for the Eighth Compensation District of the Bureau of Employees' Compensation, on the 13th day of May, 1960, purporting to be made by virtue of the authority conferred on said Deputy Commissioner by the provisions of the Long-
2 shoremen and Harbor Workers' Compensation Act, and further for a stay of payments and the preventing of the imposition of a penalty for failure to make the payments pursuant to said order. A copy of said Order attached hereto and marked Exhibit "A" is made a part of this complaint.

2.

This Court has jurisdiction of this complaint by virtue of the provisions of the Longshoremen and Harbor Workers' Compensation Act, Section 21(b), Act of March 4, 1927, 33 U.S.C., §921(b).

3.

The Travelers Insurance Company is a corporation incorporated under the laws of the State of Connecticut with a permit to do business in the State of Louisiana and Texas, and is the insurer of Levingston Shipbuilding Company, under the terms of the Longshoremen and Harbor Workers' Act at all times material hereto.

4.

Levingston Shipbuilding Company is a corporation incorporated under the laws of the State of Delaware with a permit to do business in the State of Louisiana and Texas, and at all times material hereto was the employer of Roger D. McGuyer.

5.

The defendant, C. D. Calbeck, Deputy Commis-
3 sioner, is the Deputy Commissioner for the Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor, and can be served at the Post Office Building, Galveston, Texas.

6.

The defendant, Isabell Scott McGuyer, claims to be the surviving wife of Roger D. McGuyer, and Thomas Dalton McGuyer and Curtis Austin McGuyer, claim to be surviving children of the employee, Roger D. McGuyer, and each of said defendants can be served with process at 1407 South Seventh Street, Temple, Texas.

7.

That on and before July 8, 1957, Roger D. McGuyer was employed by plaintiff, Levingston Shipbuilding Company, as a welder; that said employment contract was made within the State of Texas and on July 8, 1957, the said employee, Roger D. McGuyer, was temporarily working as a welder on the construction of a drilling barge, the hull of which was floating upon navigable waters, to-wit, the Sabine River, on the Louisiana side, at which time he sustained injuries resulting in his death on July 16, 1957; that

said drilling barge was being constructed by Levingston Shipbuilding Company, had never been used in navigation, had not been turned over to the owners, and was not completed until several months after the accident made the basis of this claim.

4

8.

That at the time of the accident above described, Levingston Shipbuilding Company had more than three employees and was engaged in a work covered by the Texas Workmen's Compensation Act and the said employee, Roger D. McGuyer, was covered by the Texas Workmen's Compensation Act, and the said employer, Levingston Shipbuilding Company, was a subscriber under the terms of said Act, and The Travelers Insurance Company was the insurance carrier under the Texas Workmen's Compensation Act.

9.

That at the time of said accident above described, Levingston Shipbuilding Company was insured by the plaintiff, The Travelers Insurance Company, under the terms and Provisions of the Longshoremen and Harbor Workers' Compensation Act.

10.

That after the death of the employee, Roger D. McGuyer, as above described and alleged, the defendant, Isabell Scott McGuyer, and the defendants, Thomas Dalton McGuyer, and Curtis Austin McGuyer, filed claim for Workmen's Compensation with the Industrial Accident Board of the State of Texas, claiming that they were the surviving wife and surviving children of the said Roger D. McGuyer and claiming the death benefits provided by said Act,

5 and thereafter, the said defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer, filed claim with the Deputy Commissioner under the Longshoremen and Harbor Workers' Compensation Act.

11.

That after formal hearing, Deputy Commissioner C. D. Calbeck, by Order dated and filed on February 18, 1959,

rejected the claim of said defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer, and Curtis Austin McGuyer, on the grounds that said claim did not fall within the terms and provisions of the Longshoremen and Harbor Workers' Act because the said work was being done on an uncompleted vessel. Copy of said Order of February 18, 1959 and marked Exhibit "B" is attached hereto and made a part of this Complaint, and thereafter, by Order entered July 30, 1959, defendant, Deputy Commissioner C. D. Calbeck, modified said award by finding that the injury to Roger D. McGuyer occurred in an accident in Calcasieu Parish, Louisiana. A copy of said Award, marked Exhibit "C" is attached hereto and made a part hereof. That said awards denying the claims of defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer, Curtis Austin McGuyer, dated February 18, 1959, and dated July 30, 1959, were made pursuant to claim made on the accident and death of Roger D. McGuyer as above alleged.

12.

That the Texas Workmen's Compensation Act, Articles 8306 et seq., Vernon's Annotated Civil Statutes, Revised 1925, as amended, validly and constitutionally provides compensation for the above described accident and death, being the one made the basis of the award of Deputy Commissioner C. D. Calbeck and sought to be set aside in this action, and that the same provides for death benefits for 360 weeks at $25.00 per week, provides that the same shall go to the surviving widow and the minor children, and the defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer, claim that they are the surviving widow and minor children of the deceased.

13.

That pursuant to the order of the defendant Deputy Commissioner, C. D. Calbeck, marked Exhibit "A" and dated May 13, 1960, plaintiff, The Travelers Insurance Company, has paid all amounts ordered to be paid to date of filing this Complaint, totalling the sum of $8,024.55; that under the terms and provisions of the Texas Work-

men's Compensation Act, the plaintiff, The Travelers Insurance Company, would owe by reason of the death of Roger D. McGuyer the sum of $9,000.00 plus interest at the rate of 4% on each weekly $25.00 payment due on and after July 16, 1957.

14.

That the Findings of Fact and Order of the Deputy Commissioner dated May 13, 1960 and being Exhibit "A" attached hereto are not in accordance with the law and facts and should be set aside; that said Order is not supported by facts and is contrary to the law as followers:

(1) that compensation for the accident and death of Roger D. McGuyer is validly and constitutionally covered and provided for by the Texas Workmen's Compensation Act;

(2) that the said Roger D. McGuyer at the time of the accident made the basis of the Order and claim was doing non-maritime work which was covered by the Texas Workmen's Compensation Act and, therefore, excluded by the terms and provisions of the Longshoremen and Harbor Workers' Act and particularly 33 U.S.C.A., §903(a), wherein compensation under the Act is provided only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

(3) that the Order of the defendant, Deputy Commissioner C. D. Calbeck, dated February 18, 1959, marked Exhibit "B" and attached hereto is a final order and res judicata of this claim;

(4) that there was no change in conditions or a mistake in a determination of fact at the time of the entry of the award of May 13, 1960, and thus no jurisdiction of the Commissioner for entering any such award.

(5) that there is no finding of fact in the Award of May 13, 1960 to the effect that there has been any change in conditions or a mistake in a determination of fact to support any jurisdiction for the award of May

13, 1960, and for the re-opening and reviewing and changing of the previous Award of February 18, 1959 rejecting the claim.

(6) there is no evidence in the record to sustain the findings of the Deputy Commissioner in the Award of May 13, 1960 that the injury and death comes under the terms and provisions of the Longshoremen and Harbor Workers' Compensation Act.

(7) there is no evidence in the record to sustain the Deputy Commissioner's award of compensation to the defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer.

(8) there is no evidence in the record that the use to which the uncompleted barge upon which the deceased Roger D. McGuyer was working at the time of his accident was capable of being put and the business for which it was intended related to the purposes of navigation, as found by the Deputy Commissioner.

(9) that there are no findings of any new facts by the Deputy Commissioner in the award of May 13, 1960 so as to justify the re-opening of said claim and of making said Award.

(10) that there is no provision in the Longshoremen and Harbor Workers' Compensation Act for the making of the award of May 13, 1960;

9 (11) the evidence in the record is undisputed to the effect that the accident occurred when the employee was engaged in welding on a barge under construction and which had never been in navigation and thus a non-maritime employment.

15.

The Claim for Compensation, the Answer of the plaintiffs and the duly transcribed notes of testimony taken at the hearing and the Awards of the Deputy Commissioner are all in the custody of the defendant C. D. Calbeck, and it is necessary for this Court to have possession of the papers and the records of said hearing and all other rele-

vant papers in the possession of the Deputy Commissioner in order to determine whether or not the award of May 13, 1960 was in accordance with the law.

16.

There is not in the record of the testimony in this case any evidence to support an award of compensation as entered by the Deputy Commissioner on May 13, 1960 and the plaintiffs herein will be irreparably damaged if an interlocutory injunction is not granted, and the payment of compensation under said Award stayed after payment has reached the maximum provided by the Texas Workmen's Compensation Act, pending the final hearing on this Complaint to reverse and set aside the Award of Compensation dated May 13, 1960. Plaintiff has paid the compensation ordered to be paid pursuant to said Award of May 13, 1960, as of the filing of this complaint, but if plaintiffs continue to pay all of said award, same will be far in excess of that provided by the Texas Workmen's Compensation Act, and if the Award of May 13, 1960 is set aside, the plaintiffs will not be able to recover said amounts, as there is no bond or other protection given by the defendant claimants to secure the return of any such over-payment if it should be held that this claim comes under the Texas Workmen's Compensation Act. Further, this plaintiff, The Travelers Insurance Company, cannot refuse to pay said claim without incurring a 20% penalty as provided by Section 914 of the Longshoremen and Harbor Workers' Act, subdivision (f) wherein it is stated:

> "If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an interlocutory injunction staying payments is allowed by the court as provided therein." (33 U.S. C.A. 914)

The plaintiffs herein have no adequate remedy at law and have no means for the redress of the wrongs whereof they herein complain except through injunction proceedings mandatory or otherwise to set aside the award herein referred to.

11 WHEREFORE, plaintiffs pray:

(a) that a mandatory injunction be granted by and issued from this Court to Defendant C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, commanding him to deliver to this Court or the Clerk thereof a certified transcript of the Claim for Compensation, the Answer thereto, the transcribed notes of testimony, and the Awards of February 18, 1959, July 30, 1959, and May 13, 1960, and all other papers or matters relevant to the hearings conducted by him in Case No. 659-23s (Fatal).

(b) that an interlocutory injunction be issued restraining the defendant C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, from enforcing said award of compensation or imposing any penalty upon the plaintiffs for not paying the installments in accordance with said award after plaintiffs have paid an amount equal to that provided for by the Texas Workmen's Compensation Act.

(c) that a permanent injunction be granted by and issued from this Court to the defendant C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, perpetually restraining said defendant from enforcing the aforesaid Award of Compensation;

12 (d) that a mandatory injunction be granted by and issued from this Court to said defendant, C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, directing him to set aside the findings of fact and order of payment and that he be ordered

to make an order dismissing, rejecting, and dis-allowing said claim.

Plaintiffs pray for such other and further relief as they may be entitled to.

CAVANAUGH, HICKMAN, BRAME & HOLT
520 Weber Building
Lake Charles, Louisiana

s/ MEREDITH T. HOLT

LOUIS NELSON
349 McFadden Bldg.,
Beaumont, Texas

s/ LOUIS NELSON

Attorneys for Plaintiffs, Levingston Shipbuilding Company and The Travelers Insurance Company

13 **Exhibit "A" to Complaint**

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

COMPENSATION ORDER SUPPLEMENTAL FINDINGS OF FACT

Case No. 659-238 (Fatal)

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

MRS. ISABELL SCOTT McGUYER, Widow
THOMAS DALTON McGUIRE and
CURTIS AUSTIN McGUIRE, Minor Children of
ROGER D. McGUYER, Deceased Employee
Claimants

v.

LIVINGSTON SHIPBUILDING COMPANY
Employer

THE TRAVELERS INSURANCE COMPANY
Insurance Carrier

Compensation Orders having been filed herein on February 18, 1959, and July 30, 1959, and an action for judicial review of said Orders having been brought in the United States District Court for the Western District of Louisiana, Lake Charles Division, and said Court on the 20th day of April 1960, having issued an Order in said Action as follows:

"This case is remanded to the Deputy Commissioner in order to permit him to make findings and conclusions in accordance with the facts and the law."

14 Now pursuant to said Order the Deputy Commissioner makes the the following

Findings of Fact

On July 8, 1957, the employee above named was in the employ of the employer above named at Calcasieu Parish, Louisiana. The liability of the employer for compensation under the Longshoremen's and Harbor Workers' Com-

pensation Act was insured by The Travelers Insurance Company.

On the said day the employee, while performing service as a welder for the employer aboard a drilling barge, Job No. 554, at the employer's shipyard, said vessel then being afloat upon the navigable waters of the United States, sustained personal injury from which he died on July 16, 1957. The employee was welding on the port side of the deck when an accumulation of gases exploded in a tank about 40 feet away, throwing a skip bucket through the air and striking the employee. He sustained severe head injuries, fracture of both arms, both legs and lacerations of the right foot. The employee died from cerebral concussion that resulted from said injury. The injury and death arose out of and in the course of his employment.

The Drilling Barge on which the employee was working was launched and afloat upon navigable waters at the time of the accident. The use to which the vessel was capable of being put and the business for which it was intended related to the purposes of navigation. The employee was at work upon a structure designated for maritime uses. He was engaged at work upon navigable waters in the completion of a new vessel launched but not quite finished or placed in navigation. The employer had other employees who were engaged in maritime employment.

Written notice of injury and death was not given to the employer within thirty days, but the employer had knowledge of the injury and death of the employee and has not been prejudiced by the lack of such written notice. The employer furnished the employee with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the employee at the time of injury was $81.00. He was not paid full wages for day of injury.

As a result of the injury the employee was wholly disabled from July 8, 1957, to July 15, 1957, inclusive, less the three day waiting period prescribed by law, for which he was entitled to compensation for temporary total disability for 5/7ths week at $54.00 per week, $38.57.

Mrs. Isabell Scott McGuyer, who was born on July 25, 1923, and married to the employee on January 2, 1948, is the surviving wife of the employee. She was living with

and dependent upon the employee for support at the time of his injury and death. She is therefore entitled
16 to death benefits at $28.35 per week (35 per cent of $81.00) beginning July 16, 1957, and continuing subject to the limitations of the said Act, during widowhood, with two years' compensation in one sum upon remarriage.

Thomas Dalton McGuyer, who was born on November 10, 1955, and Curtis Austin McGuyer, who was born on June 2, 1957, are the surviving minor children of the employee. Each of said minor children is entitled to death benefits at $12.15 per week (15 per cent of $81.00), beginning July 16, 1957, and continuing thereafter until he shall have attained 18 years of age, subject to the limitations of the Act. The death benefits in behalf of said minor children shall be payable to their mother and natural guardian, Mrs. Isabell Scott McGuyer.

Accrued compensation for temporary total disability, death benefits and funeral expenses to include May 9, 1960, amounts to $7,778.12. The funeral expenses on behalf of the employee were rendered by Claybar Funeral Home, Pine Street, Orange, Texas, at a cost of $986.50, which was paid by Mrs. Isabell Scott McGuyer. The employer and the insurance carrier are liable for $400.00 as reasonable funeral expenses. The employer and the insurance carrier have paid $153.57 as disability and or death benefits under the Texas Workmen's Compensation Act, for which they are entitled to take credit.

Upon the foregoing findings of fact the Deputy
17 Commissioner makes the following

Award

The employer, the Levingston Shipbuilding Company, and the insurance carrier, The Travelers Insurance Company, shall pay compensation and death benefits to Mrs. Isabell Scott McGuyer in her own behalf and in behalf of Thomas Dalton McGuyer and Curtis Austin McGuyer as follows: Death benefits from July 16, 1957, to May 9, 1960, inclusive, 147 weeks at the combined rate of $52.65 per week, $7,739.55. Subsequent to May 9, 1960, they shall continue the payment of death benefits to Mrs. Isabell Scott McGuyer in her own behalf and in behalf of said

minor children at the combined rate of $52.65 per week, payable in biweekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner.

The employer and the insurance carrier shall also pay to Mrs. Isabell Scott McGuyer compensation due the employee for temporary total disability from July 8, 1957, to July 15, 1957, inclusive, less the three day waiting period prescribed by law, 5 7ths week at $54.00 per week, $38.57.

The employer and the insurance carrier having paid $153.57 as disability and or death benefits, shall pay forthwith $7,624.55.

The employer and the insurance carrier shall also pay $400.00 to Mrs. Isabell Scott McGuyer as reasonable
18 funeral expenses.

An attorney's fee of $1,700.00 is approved in favor of Mandell & Wright, Attorneys, for services rendered and expenses incurred on behalf of the claimant, such sum to be a lien upon and be paid out of this award.

Given under my hand at Galveston, Texas this 13th day of May, 1960.

C. D. CALBECK
Deputy Commissioner Eighth Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

By Registered Mail:

Mrs. Isabell Scott McGuyer
1407 So. 7th Street, Temple, Texas

Levingston Shipbuilding Company
P. O. Box 411, Orange, Texas

The Travelers Insurance Company
Payne Building, Port Arthur, Texas

By Regular Mail:

Strong, Moore, Pipkin, Strong & Nelson
P. O. Box 1632, Beaumont, Texas

Mandall & Wright
South Coast Building, Houston 2, Texas

Bureau of Employees' Compensation
U. S. Dept. of Labor, Washington 25, D. C.

Mailed: May 13, 1960

C. D. Calbeck
Deputy Commissioner

19 **Exhibit "B" to Complaint**

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

COMPENSATION ORDER

REJECTION OF CLAIM

Case No. 659 238 (Fatal)

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

MRS. ISABELL SCOTT McGUYER, Widow, and
THOMAS DALTON McGUIRE and
CURTIS AUSTIN McGUIRE, Minor Children of
ROGER D. McGUYER, Deceased Employee
Claimants

v.

LIVINGSTON SHIPBUILDING COMPANY
Employer

THE TRAVELERS INSURANCE COMPANY
Insurance Carrier

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

On July 8, 1957, the employee above named was in the employ of the employer above named, whose address is P. O. Box 411, Orange, Texas, in the Eighth Compensation District. The employer was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, entitled "An Act to provide compensation for
20 disability or death resulting from injury to employees in certain maritime employments, and for other purposes." The liability of the employer for compensation under the said Act was insured by The Travelers Insurance Company.

On the said day the employee herein, while performing service as a welder for the employer aboard a Drilling Barge, Job No. 554, at the employer's shipyard at Orange, Texas said vessel then being afloat upon the navigable waters of the United States, sustained personal injury from which he died on July 16, 1957. The employee was welding on port side of deck when an accumulation of gases exploded in tank about 40 feet away, throwing a skip bucket through the air and striking the employee. As a consequence thereof the employee sustained severe head injuries, fracture of both arms, both legs and lacerations of the right foot. The employee died from cerebral concussion that resulted from contusion of head on July 8, 1957. The employee's injury and death arose out of and in the course of his employment.

Written notice of injury and death was not given to the employer within thirty days, but the employer had knowledge of the injury and death of the employee and has not been prejudiced by the lack of such written notice. The average weekly wage of the employee herein at the time of the injury was $81.00.

Isabell Scott McGuyer, who was born on July 25,
21 1923, and married to the employee on January 2, 1948, is the surviving wife of the employee. She was living with and dependent upon the employee for support at the time of his injury.

Thomas Austin McGuyer, who was born on November 10, 1955, is a surviving son of the employee.

Curtis Austin McGuyer, who was born on June 2, 1957, is a surviving son of the employee.

Funeral services were rendered in behalf of the employee by Claybar Funeral Home, Pine Street, Orange, Texas, at a cost of $986.50.

The Drilling Barge was launched and afloat upon navigable waters. At the time of the accident the said barge was on navigable waters. The use to which the vessel was capable of being put and the business for which it was intended related to purposes of navigation. The employee was at work upon a structure designated for maritime uses. He was engaged upon navigable waters in the completion of a new ship launched but not quite finished or placed in navigation. The employer had other employee, some of whom were engaged in maritime employment.

Upon the foregoing findings of fact, the Deputy Commissioner Orders that the claim for death benefits filed by Mrs. Isabell Scott McGuyer in her own behalf and in behalf of Thomas Austin McGuyer and Curtis Austin McGuyer, minor sons of the employee, be and they are hereby REJECTED for the following reason:

22 It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand at Galveston Texas this 18th day of February.

C. D. CALBECK
Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

By Registered Mail:

Mrs. Isabell Scott McGuyer
1407 So. 7th St., Temple, Texas

Levingston Shipbuilding Company
P.O. Box 411, Orange, Texas

The Travelers Insurance Company
Payne Building, Port Arthur, Texas

By Regular Mail:

Strong, Moore, Pipkin, Strong & Nelson
P.O. Box 1632, Beaumont, Texas

Mandell & Wright
South Coast Bldg., Houston, Texas

Bureau of Employees' Compensation
U. S. Dept. of Labor, Washington 25, D. C.

Mailed: **February 18, 1959.**

C. D. CALBECK
Deputy Commissioner

Exhibit "C" to Complaint

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

COMPENSATION ORDER

MODIFICATION OF AWARD

Case No. 659-238 (Fatal)

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

MRS. ISABELL SCOTT McGUYER, Widow, and
THOMAS DALTON McGUYER and
CURTIS AUSTIN McGUYER, Minor Children of
ROGER D. McGUYER, Deceased Employee
Claimants

v.

LEVINGSTON SHIPBUILDING COMPANY
Employer

THE TRAVELERS INSURANCE COMPANY
Insurance Carrier

On February 18, 1959, a Compensation Order, Rejection of Claim, was filed in the above entitled case. In the said Compensation Order the claimant's claim for compensation was rejected for the reason it has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and it was found that the accident occurred at the employer's shipyard at Orang, Texas. The claimant thereafter instituted proceedings for judicial review and the case was the subject of consideration by the United States
24 District Court for the Eastern District of Texas. Subsequently a motion was filed in behalf of the Government to dismiss cause No. 4143 for lack of jurisdiction. The said Court refrained from a dismissal and entered an order on May 26, 1959, directed to the defendant Deputy Commissioner as follows:

"It Is, Therefore, Ordered, Adjudged and Decreed that the Order of the Defendant-Deputy Commissioner, C. D. Calbeck, which is made the basis of this suit, be, and the same is hereby remanded to him to reconsider the question of the situs of injury to be in Orange, Texas."

Compensation Order filed February 18, 1959, is made a part hereof by reference.

The parties have submitted Stipulation of Facts, including the following: * * * the accidental injury made the basis of this suit occurred within the boundaries of Calcasieu Parish, Louisiana.

No further hearing have been applied for by any interested party, the Deputy Commissioner, pursuant to the directions of the Order of the Court, hereby amends and corrects said Compensation Order by deleting the words "Orange, Texas," from the third line from the bottom of page one thereof and thereby causing said line to read as follows: * * * "employer's shipyard at Calcasieu Parish, Louisiana, said vessel then being afloat . . ."

It Is Further Ordered that the decision as re-
25 produced shall contain the foregoing correction and amendment.

Given under my hand at Galveston Texas this 30th day of July, 1959.

C. D. Galbeck
Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer and the insurance carrier at the last known address of each as follows:

By Registered Mail:

Mrs. Isabell Scott McGuyer
1407 So. 7th Street, Temple, Texas

Levinston Shipbuilding Company
P. O. Box 411, Orange, Texas

The Travelers Insurance Company
Payne Building, Port Arthur, Texas

By Regular Mail:

Strong, Moore, Pipkin, Strong & Nelson
P. O. Box 1632, Beaumont, Texas

Mandell & Wright, Attorneys
South Coast Building, Houston, Texas

Bureau of Employees' Compensation
U. S. Department of Labor, Washington 25, D. C.

C. D. CALBECK
Deputy Commissioner

Mailed: July 30, 1959.

Complaint, with attachments Exhibits "A", "B" and "C" Filed May 31, 1960

Alton L. Curtis, *Clerk*

26 IN THE UNITED STATES DISTRICT COURT

Answer of McGuyer, et al.—Filed June 16, 1960

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME ISABELL SCOTT MCGUYER, THOMAS DALTON MCGUYER, and CURTIS AUSTIN MCGUYER, Defendants in the above styled and numbered cause, and for their answer would respectfully show the Court as follows:

1.

These Defendants admit that the purpose of the plaintiffs is as set forth in Paragraph 1 of their complaint.

2.

These Defendants admit the allegations in Paragraph 2 of the plaintiffs' complaint.

3.

These Defendants admit the allegations in Paragraph 3 of the plaintiffs' complaint.

4.

These Defendants admit the allegations in Paragraph 4 of the plaintiffs' complaint, except that these defendants do not know what permits, if any, the plaintiff may have.

5.

These Defendants admit the allegations in Paragraph 5 of the plaintiffs' complaint.

6.

These Defendants not only "claim" they are the
27 surviving wife and children of the deceased, Roger D. McGuyer, they affirmatively allege that they are such.

7.

These Defendants deny the allegations contained in Paragraph 7 of the plaintiffs' complaint except in so far as such allegations are supported by the Deputy Commissioner's award dated May 13, 1960.

8.

These Defendants deny the allegations contained in Paragraph 8 of the plaintiffs' complaint except in so far

as such allegations are supported by the evidence offered and received in the formal hearing had before the Deputy Commissioner and the Deputy Commissioner's award dated May 13, 1960.

9.

These Defendants admit the allegations in Paragraph 9 of the plaintiffs' complaint.

10.

These Defendants deny the allegations in Paragraph 10 of the plaintiffs' complaint except in so far as such allegations are supported by the evidence offered and received in the formal hearing had before the Deputy Commissioner.

11.

These Defendants admit the allegations in Paragraph 11 of the plaintiffs' complaint.

12.

These Defendants deny the allegations contained in Paragraph 12 of the plaintiffs' complaint.

13.

These Defendants deny the allegations contained in Paragraph 13 of the plaintiffs' complaint, except that they do admit that approximately the sum of $8,024.55 has been paid to them by The Travelers Insurance Company.

14.

These Defendants deny the allegations contained in Paragraph 14 of the plaintiffs' complaint.

15.

These Defendants admit the allegations contained in Paragraph 15 of the plaintiffs' complaint.

16.

These Defendants deny the allegations contained in Paragraph 16 of the plaintiffs' complaint.

17.

These Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the plaintiffs' complaint.

18.

These Defendants deny that the plaintiffs are entitled to the relief prayed for.

29 WHEREFORE, PREMISES CONSIDERED, these defendants pray that the order of the Deputy Commissioner be affirmed, that the plaintiffs take nothing by their suit, and that these defendants go hence without day [sic] with their costs, and for such other and further relief to which they may show themselves justly entitled to receive.

MANDELL & WRIGHT

By s/ HERMAN WRIGHT
707 South Coast Building
Houston 2, Texas

JOSEPH E. BASS, JR.
s/ J. E. BASS, JR.
506 Weber Building
Lake Charles, Louisiana

Attorneys for Defendants, Isabell Scott McGuire, Thomas Dalton McGuire and Curtis Austin McGuire

Filed June 16, 1960
Alton L. Curtis, *Clerk*

---

30 IN THE UNITED STATES DISTRICT COURT

Motion to Dismiss by Calbeck—Filed July 21, 1960

The Defendant, C. A. Calbeck, Deputy Commissioner, appearing herein through T. Fitzhugh Wilson, United States Attorney, Western District of Louisiana, moves the Court as follows:

To dismiss this action because the complaint fails to state a claim against defendant upon which relief can be granted.

s/ T. Fitzhugh Wilson
T. FITZHUGH WILSON
United States Attorney

Filed July 21, 1960
Alton L. Curtis, Clerk

IN THE UNITED STATES DISTRICT COURT

Motion to Dismiss by McGuyer, et al.—Filed Aug. 24, 1960

COMES NOW ISABELL SCOTT MCGUYER, THOMAS DALTON MCGUYER, and CURTIS AUSTIN MCGUYER, Defendants in the above styled and numbered cause, and joins with
31 and adopts the motion to dismiss filed herein by the defendant, C. D. Calbeck, Deputy Commissioner. These defendants further adopt and join in the brief heretofore filed by the defendant, C. D. Calbeck, Deputy Commissioneir, and his supplementing letter dated August 11, 1960.

WHEREFORE, these defendants pray that the Court dismiss this action because the complaint fails to state a claim against any of the defendants upon which relief can be granted.

MANDELL & WRIGHT
By s/ Herman Wright
707 South Coast Building
Houston 2, Texas

JOSEPH E. BASS, JR.

s/ J. E. Bass, Jr.
506 Weber Building
Lake Charles, Louisiana

Attorneys for Defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer

Filed August 24, 1960
Alton L. Curtis, Clerk

32 U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Case No. 659-38 (Fatal)

MRS. ISABELL McGUYER (Widow of Roger D. McGuyer, Deceased), *Claimant*

vs.

LEVINGSTON SHIPBUILDING COMPANY, *Employer*

THE TRAVELERS INSURANCE COMPANY, *Insurance Carrier*

Excerpts From Official Report of Proceedings, 13 June 1958

County Court House Building
Orange, Texas
Friday, 13 June 1958

Met, pursuant to notice, at 9:00 a.m.

BEFORE:

C. D. CALBECK, Deputy Commissioner of the Eighth Compensation District.

33 APPEARANCES:

FOR THE CLAIMANT:
HERMAN WRIGHT (Mandell & Wright)
South Coast Building, Houston, Texas

FOR THE EMPLOYER AND INSURANCE CARRIER:
LOUIS NELSON (Strong, Moore, Pipkin, Strong & Nelson)
McFaddin Building, Beaumont, Texas.

PROCEEDINGS

The Deputy Commissioner: I will make a statement for the record and when it is completed, the respective parties will state the issues with respect to which they wish to be heard and any objections, corrections, stipulations or additions may then be offered.

Claimant is present in person and is represented by Mr. Herman Wright of the law firm of Mandell & Wright, South Coast Building, Houston 2, Texas.

The employer and the insurance carrier are represented by Mr. Louis Nelson—not Jr. or something, is it?

Mr. Nelson: No, sir.

The Deputy Commissioner: Good. Thank you.

Of the law firm of Strong, Moore, Pipkin, Strong and Nelson, McFaddin Building, Beaumont, Texas.

This hearing is being held in room number 303 County Court House Building, Orange, Texas, beginning at
34 9:00 a.m., June 13, 1958.

It is in respect to a claim for compensation filed by Mrs. Isabell Scott McGuyer, widow of Roger D. McGuyer, for death of the employee on July 16th—that's not right, is it?

Mr. Nelson: 8th.

The Deputy Commissioner: July 16th?

Mr. Nelson: 8th.

Mr. Beeson: That's correct, that is the death.

The Deputy Commissioner: That is the date of death?

Mr. Beeson: That's right.

The Deputy Commissioner: Death of the employee on July 16, 1957, from injuries sustained by him on July 8, 1957 while performing service as a welder for Leyingston Shipbuilding Company aboard a drilling barge of Pacid /sic/ Oil Company, said vessel then being afloat upon the navigable waters of the United States.

On the said date the decedent was welding on port side of vessel when an accumulation of gases exploded in a tank about forty feet away, throwing a skip bucket through the air, striking the employee.

Mr. Wright, will you please state what claim you are making this morning unless Mr. Nelson wishes to narrow the issues and tell us what particular—
35 Mr. Nelson: The only issues the insurance carrier and employer have in mind is the question of jurisdiction under the Longshoremen's and Harbor Workers' Act and, of course, the question of who are the beneficiaries.

The Deputy Commissioner: Who are the beneficiaries. Yes.

Well, that is fine.

Well, with that understanding, Mr. Wright, what claim are you making this morning, merely for the death of the employee and that you wish to prove that it arose out of and in the course of employment, and that he does or is survived by certain dependents who are entitled to death benefits?

Mr. Wright: Yes, sir, wife and two children.

The Deputy Commissioner: How about funeral expenses, burial expenses?

Mr. Wright: Yes, sir, and funeral expenses.

The Deputy Commissioner: Well, then, are you ready to put on the widow?

Mr. Wright: Yes, sir, at any time.

* * * * * *

CECIL R. BEESON

was called as a witness for and in behalf of the
36 claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

EXAMINATION BY THE DEPUTY COMMISSIONER

By the Deputy Commissioner:

Q. Your name is Mr. C. R. Beeson? A. Cecil R. Beeson.

Q. And your office or residence address, either one? A. Office address is Front and Mill Streets, Levingston Shipbuilding Company, Orange, Texas.

The Deputy Commissioner: Mr. Wright?

Direct Examination

By Mr. Wright:

Q. Mr. Beeson, I believe you are employed by the Levingston Shipbuilding Company? A. Yes, sir.

Q. And in what capacity are you employed there? A. I am Director of Industrial Relations, Personnel and Safety.

Q. I take it that you are acquainted with the operations of the plant and that sort of thing. A. Yes, sir.

Q. First of all, let me ask you the size of your facility.

A. Physical—

37 Q. Area. A. —area? Approximately 90 acres.

Q. Are all of the facilities contiguous? Do they touch? Or do you have— A. No, sir.

Q. —separate operations? A. They are divided by a river.

Q. I see. A. And by a street.

Q. And by a street? A. Yes, sir.

Q. Now, the river involved is the Sabine River, isn't it? A. Yes, sir.

Q. You are acquainted with the river, I take it? A. Pretty well.

Q. You have seen ships of considerable size go up and down it, have you not? A. Yes, sir.

Q. The Levingston Shipbuilding Yards are located below or let me put it this way:

The river is navigable for ocean going vessels above the location of your shipyard, is it not? A. For ocean going vessels of certain sizes, yes.

Q. Well, we are talking about a normal tanker or cargo vessel. A. Normal tanker, no, sir.

38 Q. A normal tanker it could not accommodate? A. Something—beg your pardon?

Q. You say it will not accommodate a normal tanker? A. A small tanker, yes.

Q. Well, take one of the T-2 type. Would it accommodate a T-2 tanker? A. Possibly, but not recommended.

Q. But it will accommodate tankers smaller than the T-2? A. Yes, sir.

Q. Cargo vessels, about what size will it accommodate? A. Smaller than a C-3 or C-4.

Q. Smaller than a C-3.

And that is typical for the river above your facilities? A. Approximately about two miles above.

Q. About two miles above.

And it's common all the way below your facility, from your facility to the channel? A. As far as we know, the ship channel is 32 feet in depth.

Q. Yes, sir.

And will accommodate ships of a draft less than 32 feet? A. Yes, sir.

Q. Now, a portion of your plant is located, I

39 believe, on an island? A. Yes, sir.

Q. And the balance of it is on the mainland shore of the river, is that correct? A. That's right, sir.

Q. What part of your operations do you carry on at the facility on the island? A. Well, it depends on the volume of construction work in the company at the time to determine about the percentage of work that is going on over there, but I would answer that in this respect, that we do a great deal of our erection, construction and outfitting on the island premises.

Q. I see.

Do you have ways both— A. We have construction ways, yes, sir.

Q. In both places? A. Both places, yes, sir.

Q. And do you do any repair work in addition to building vessels? A. Yes, sir.

Q. And what size vessels will your facilities accommodate? A. I beg your pardon, I wanted to clarify one thing.

Q. I am sorry. A. You mean does our company do repair work besides construction?

Q. Yes. A. Yes. I thought maybe you meant do we do most of it in certain areas.

Q. No, just that your company did do it. A. Our company does do both types of work.

Q. Yes. And what is the largest size vessel that the facilities of your company will accommodate? A. Well, that is rather difficult to answer. If you are referring to repair facilities—

Q. First, repair facilities. A. Our dry dock handles about 3,500 tons, that is, as far as dry docking is concerned.

Q. Yes. A. But as far as repair work is concerned, it can—anything that can get up the river we can handle.

Q. Yes, sir.

Now, in the construction end, what is the largest vessel your company has constructed? A. In tonnage weight?

Q. Yes. A. I really don't know the actual size. I could give you an estimate of what I think.

Q. That is all I want, just your best judgment about it.

A. Probably 8,500, 9,000 tons.

41 Q. I see.

Now, do you repair and construct both vessels and barges, both? Do you do work on both? A. Yes, sir, we construct them new from the keel all the way up.

Q. Yes, sir. A. All the way through to the completed job, and we also repair different types of vessels.

Q. Now, I take it you have various classifications of employees in your employment. A. Yes, sir.

Q. And you have got welders and riggers and other types of workers, do you not? A. Yes, sir, craftsmen of all types.

Q. And those people work both on repair work and on construction work, do they not? A. Generally speaking, they do.

Q. In other words, a welder, for example, in your yard today may be welding on a repair job and tomorrow may be welding on building a boat? A. That's correct. On in the shop or on maintenance.

Q. Or on land or in your shops or just wherever the work is? A. That's correct.

Q. And on any given day where you have either a
42 boat sic there for repair or construction, one or more of your various employees may be involved in the operation of either repairing or constructing the particular vessel. That is true, isn't it? A. That is true.

Q. And a man today may be working on a repair job on a boat in the water and tomorrow be working in your shop? A. That is true.

Q. And because of the nature of that type work that is the reason your company carries insurance both to cover the state workmen's compensation Act and the Longshoremen's and Harbor Workers' Act, isn't it? A. I don't know but I would say that is one of the reasons. I think it's required by law.

Q. Well, it would be a little silly to carry one if you didn't need it, wouldn't it? A. I would think so.

Q. Yes, sir.

Now, are you acquainted with the events that produced the injury to Roger McGuyer? A. To a great extent. I believe I know more about it than most people.

Q. I take it you were not an eye witness to the event? A That is correct. I was not.

Q. But in your capacity with the company you
43 necessarily investigated it? A. That is true.

Q. To ascertain what happened and why and that sort of thing? A. Yes, sir.

Q. And as I understand the matter, this event occurred on a vessel which you were in the process of constructing? A. Yes, sir.

Q. Can you tell me what type vessel it was and where she was? A. Yes, sir, I believe I can.

It was a barge that we were building for the Placid Oil Company, called, identified as job number 554 in our plant.

It was a slot type barge. It was so large that we had to build it in sections or two barges and join them together.

Q. Yes, sir. A. And it was approximately 120 feet wide and about 300 feet long.

Now, I could be wrong about the exact dimensions.

Q. I understand. A. I have that in the records, but I don't know the exact dimensions offhand.

The keel was laid in our plant on May 20, approxi-
44 mately, 1956.

Q. And was that on one of your ways there? A. Yes, sir.

Q. Was that— A. We have two keels, now. You have two barges, and we laid the keel on May 11th on the first one, and on May 20th on the second one, and they were launched in September and put into position, joined together, and—

Q. All right.

Now, then, let me get back. The portion of this barge that was begun on May 11th, was that begun on one of the ways in the yard. A. Both of those barges were built on the ways on the island, if that is what you are distinguishing the difference.

Q. Yes, sir. That is what I want to get at is where it was laid.

Was it laid on the island? A. Yes, sir.

Q. And were the two sections joined together before she was launched? A. I don't know, sir. I don't know. And I am not positive of the answer I just gave you about them being built on the ways on the island.

I recall they were on the island, but I could be mistaken.

Q. Well— A. We have a great volume of work
45 at times, and that is not exactly my type of business.

Q. Well, I realize you can't be certain but that is your best present recollection about the matter? A. That is true.

Q. Now, were the two sections of the barge joined together before either section was launched, or did you join them together after you launched them?" A. I don't know, sir.

Q. Had the two sections been joined together at the time of this explosion? A. Oh, yes.

Q. In other words, the keel of the vessel was laid and she was afloat on the Sabine River at the time of this explosion? A. The keel of the vessel—the hull was in the water, and we were putting structure on it. We were just getting started on the barge, actually.

We just had two barges side by side and we had joined them and we were getting ready to build the superstructure or the quarter sections, if you so call it, onto the top of the barge.

Q. Now, how far had the— A. Now, these two barges are one unit.

46 Q. Yes, I understand. A. They are one unit.

Q. Yes, I understand.

Now, how much of the structure other than the hull had been completed before the explosion? A. How much structure of the hull?

Q. How much structure other than the hull had you completed by the time of the explosion? A. Do you want an estimate in percentage of construction?

Q. Well, no, I would rather to have sort of a description of it first. A. Well, actually we only had the two barges, which were in the river together, joined together, and you build the structure from those barges, and we had gotten only up to about the laying the top deck on the—first deck on the superstructure. We had set the first section of six columns, approximately forty feet in height, against a 200 foot column. That is about as far as we had gotten. I would say on a percentage of construction basis, we were possibly fifty per cent complete on our whole job and only about ten per cent started on our superstructure.

Q. I see.

Now, what classification of workers did you have on the boat that day? A. What class of workers?

Q. Yes. Of course, you had— A. Most all types

47 of craftsmen.

Q. Well, name me a few. You had welders, at

least. A. I had welders, shipfitters, helpers, apprentices of various crafts, but in particular, welders and shipfitters, and electricians, possibly some painters and laborers. Possibly some crane operators and riggers.

Q. Now, let me ask you this:

Let's take a repair job—first, let me ask you this:

Was this barge intended as a tank type barge or cargo, or what? A. No, it's intended as a drilling unit for an oil company.

Q. A drilling unit for an oil company? A. Yes, sir.

Q. Do you know what draft the barge had? A. I believe it was sixteen feet, sir.

Q. Sixteen feet? A. I am not positive.

Q. Do you know how much— A. I believe that was the depth.

Q. Do you know how much draft she had at that time? A. Oh, draft?

Q. Yes. A. I thought you meant how much depth the barge tanks were. Oh, the draft, I would say it was
48 probably, oh, I would just guess it was possibly between six and eight feet.

Q. Well, now, this drilling barge we are talking about, in the hull structure were there living quarters being built in there? A. At that time we had not reached that phase of operation.

Q. You had not reached that phase. Had you reached the stage where you had any partitions in the hull? A. We had some bulkheads in the hull but not any—we had not reached the stage of construction where anything was completed.

Q. Yes, I understand that, but you did have some bulkheads? A. We had some bulkheads.

Q. Now, then, let's take a vessel in your yard for repair. It would not be uncommon, would it, to have welders, shipfitters, electricians, painters and riggers on the boat doing repair work all the time, all at the same time, would it? A. It would not be uncommon to have all craftsmen.

Q. That is what I say, it would not be uncommon and the welders would be welding just the same on one you were building as on one you were repairing? In other words, welding is welding whether a boat is being built

or being repaired, isn't that true? A. Well, that's
49 correct.

Q. And the same thing is true of the other classifications. A shipfitter is doing shipfitting work whether it's being done on a boat that is being constructed in the water or one that is being repaired in the water, isn't that true? A. I am sorry, I didn't quite hear you, sir?

Q. I say a shipfitter is doing shipfitting work whether he is on a vessel being constructed or whether he is on one that is being repaired? A. That's correct.

Q. And the same thing is true of the electricians, they do exactly the same thing, they do electrical work either way, that is true, isn't it? A. Within their craft jurisdiction, that's right.

Q. That is what I said. In other words, these crafts that you employ do the same type and kind of work whether they are working on a boat being constructed or one being repaired, the work is basically the same? A. That's correct.

Q. And this vessel that we are talking about involved in this accident was afloat on the river just like one that was completed, wasn't she? I mean she floated on the water just like a completed vessel? A. It was afloat, but it certainly wasn't in the condition of being accepted as safe.

50 Q. I understand they didn't want it to be put in use that day, but it floated just like one that was completed, didn't it? A. It floated.

Q. In other words, it didn't sink? A. It was floating.

Q. Let me ask you this question:

Are you familiar with cargo-type barges that are open, say, like a shell barge? A. What do you mean am I familiar with it?

Q. Have you seen them? A. I have seen some, yes, sir, but I might not be familiar with the dimensions and the details of them.

Q. I understand that. I understand that.

This barge that we are talking about in this lawsuit, could she have been loaded with some cargo, say, like some shell and towed? Was her hull that much completed? A. I don't believe.

Q. All right.

What part of her was so uncompleted that that couldn't have been done? A. Well, as far as if you are referring

to the fact that because it was a vessel that was floating and it had the size that you could pile stuff on it and it floated it down, that possibly you could by having
51 removed some of the superstructure off of it.

Q. That is what I am talking about, if you didn't have the superstructure there you could load it just like a shell barge and tow it, couldn't you? A. I would hesitate to answer that in an affirmative manner because I don't know whether you could be successful in towing it or not, but I think you could load quite a bit of stuff on it and it would float while it was loaded, but as to whether you could tow it or whether you could put it into some position, I don't know whether you could or not.

Q. If you had a tug big enough, you could move it, couldn't you? You had to move it, yourself, didn't you? A. Yes, we had to move it, ourselves, but we had difficulty moving it.

Q. Well, I understand you may have had some difficulty moving it, but as I understand it you had moved it around on the water, yourself, before this date. A. Only from the launching area to its present location, which is just a little ways.

Q. Even if it was only ten feet you had moved it on the water, had you not? A. Yes, we had moved it, but not all that many different times.

Q. Well, I understand there was probably only once or twice, but you had moved it on the water, had you
52 not? A. That's correct.

Q. One other question.

Are you acquainted with the mothball fleet on the Sabine around here? A. Well, I have seen the—

Q. You have seen it? A. I have seen the ships in the mothball fleet.

Q. It's above the shipyard, isn't it? A. Geographically, yes.

Q. Yes, that is what I mean, geographically it's above your shipyard. And those vessels are of what type that are laid up there? A. Well, they have various types of ships. They call them auxiliary service vessels to the fleet, to the 16th fleet. They have different types of vessels. Military vessels are what they are. But I don't know what various—

Q. They are sizable boats, aren't they? A. There are

several different sizes up there. Many different sizes, in fact.

Q. I say many of them are pretty sizable, aren't they? A. Yes, sir. Those vessels are not towed around, towed out by our shipyard to their area of location, though.

Q. I am sorry, I apparently didn't understand you, sir. A. I just said those vessels are not towed out by the shipyard to their area.

53 Q. Are you talking about the mothball fleet? A. To their location. That's correct.

Q. Oh, I didn't mean to imply that you had anything to do with them, at all. I just wanted to know if they were above your shipyard, geographically above it. A. Geographically, they are.

Mr. Wright: I believe that is all.

Cross Examination

By Mr. Nelson:

Q. You handle the claims for injuries received in the course of employment at your place of business? A. Yes, sir.

Q. How long have you been doing it? A. At Levingston, fifteen years.

Q. Has Levingston repaired and built new barges during that entire time? A. Yes, sir.

Q. Have you had injuries on new construction before? A. Yes, sir.

Q. Have you had claims for compensation before? A. Yes, sir.

Q. Have you always reported them to the Industrial Accident Board? A. On new construction, yes, sir.

54 Mr. Wright: I object to it as being immaterial.

The Deputy Commissioner: Oh, let it go. I don't see it makes any difference one way or the other.

By Mr. Nelson:

Q. Have they ever refused to take jurisdiction of one? A. No, sir.

Q. Since you have been there? A. No, sir.

Q. To your knowledge have they ever refused to take jurisdiction at this plant? A. No, sir.

Mr. Wright: May I have my objection to all this line of questioning?

The Deputy Commissioner: Yes. The objection is noted to the questions of the defense attorney.

By Mr. Nelson:

Q. You reported this to the Industrial Accident Board in accordance with the regulations within the period of time required? A. Yes, sir.

Q. On the employer's first report form? A. Yes, sir.

Q. And this was a drilling barge being built by your company? A. Yes, sir.

55 Q. From the bottom up? A. Yes, sir.

Q. When did you say it was launched? A. I could give you the exact dates. I think it was along about September 20th, I believe. If you want the exact dates, I have it in my records.

Q. If you have it there let's see when it was launched. A. The keel laid May 20th, 1956. Was launched September 27, 1956. The keel laid May 11th was launched November 7, 1956.

Q. Do you know what was done before, that is, at the time it was launched, what condition it was in? A. No, sir, I don't know what condition it was in. That was just the first step in building the barge is to build the hull, and it was such a size that we couldn't build it in one section, one unit. We had to build it in sections, so we built it in two sections and we put it in the water and joined the sections together, which is very commonly done in our type of operations.

Q. Did it have any decking on it? A. Yes, it had decking on the barge bottoms.

Q. When it was launched? A. Yes, sir.

Q. From that time on did it stay there at your
56 plant to be worked on or did it go elsewhere? A. No, sir, it stayed there at our shipyard until it was completed, about two months ago.

Q. How did you get on it? A. By way of a gangplank from the wharf to the barge.

Q. Was it attached to the land or wharf or anything? A. The barge, you mean?

Q. Yes. A. It was tied off onto the wharf as any vessel,

and the grounds from the welding cables and so forth from the land to the barge. It was tied by cable and it's tied by rope, and it's tied by gangplank.

Q. Did it have gangplanks permanently affixed or did you put them on every day? A. It had grangplanks affixed only for the period of time it was there in operation, I mean, there in construction. During all that time.

Q. During all that time you kept it attached to the wharf or the dock by permanent gangplanks, is that correct? A. That's right.

Q. You didn't have to go by boat out to get on this barge to go to work? A. No, sir.

Mr. Nelson: I believe that is all.

* * * * * * * * * * *

Report of Proceedings Filed October 4, 1960
Alton L. Curtis, *Clerk*

---

57 IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 7873

THE TRAVELERS INSURANCE COMPANY
AND
LEXINGSTON SHIPBUILDING COMPANY

VS.

C. D. CALBECK, Deputy Commissioner for the Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor; ISABELL SCOTT McGUYER: THOMAS DALTON McGUYER: and CURTIS AUSTIN McGUYER

Opinion—Oct. 26, 1960

* * * * * * * * * * *

58 HUNTER, *Judge*:

McGuyer sustained a fatal injury while performing his duties as a welder aboard a drilling barge which had been launched and was afloat upon navigable waters. The barge,

approximately fifty per cent complete, had not been placed in navigation. The employer, Levingston Ship Building Company, had other employees engaged in maritime employment.

The widow, in behalf of herself and her children, filed a claim pursuant to the Longshoremen's and Harbor Workers' Act for compensation by reason of the death of her husband while in the employ of Levingston.

The Deputy Commissioner at first agreed with the contention of the plaintiff (Levingston Ship Building Company and its insurer, Travelers); however, subsequently he entered a new award whereby he held the Longshoremn's and Harbor Workers' Act applicable and awarded death benefits to the widow and children of McGuyer.

This suit was instituted by the employer and its insurer to enjoin the enforcement of the award of May 13, 1960 on the ground that new construction is non-maritime in nature, and therefore the death of deceased is compensable only under the Workmen's Compensation Act of the State of Texas. The Commissioner, defendant herein, has filed the original report of the proceedings taken before the Deputy Commissioner on June 13, 1958, together with a certified and true copy of the compensation order filed by the Deputy Commissioner on May 13, 1959.

59

The Law

The facts are simple and not disputed. The question is one of law only and may be stated to be:

> *Is compensation coverage under the State (Texas) or Federal (Longshoremen's and Harbor Workers' Compensation) Act?*

Travelers' position may be precisely summarized as follows: The deceased sustained his fatal injury while upon navigable waters of the United States, performing the work of a welder upon the hull of a barge that was afloat and still under construction; therefore, he was engaged at the time of his death in non-maritime work, and the State of Texas could and had validly provided a remedy which is an exclusive remedy. Plaintiff's con-

clusion is categorically supported by *United States Casualty Company* v. *Taylor, et ux*, 64 F. 2d 521, 4 C.C.A., 1933, and *Grant Smith-Porter Ship Company* v. *Rohde*, 42 S. Ct. 157, 257 U.S. 469, 1922.

We think the Supreme Court[1] and the Appellate Courts[2] have, by subsequent pronouncements, made it quite
60 clear that an employee's right under the Longshoremen's Act for an injury received on navigable waters depends not upon the particular employee's status, but rather upon whether or not his employer had "any * * * employees" engaged in maritime employment.

Here, McGuyer's death arose out of and in the course of his employment, and since Levingston had other employees engaged in maritime employment, and since McGuyer's death admittedly occurred upon navigable waters of the United States, his widow and children were entitled to compensation under the Act (Sec. 902, sub para. 2, and 903a, Title 33 U.S.C.A.: *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 73 S. Ct. 302; *Dixie Sand and Gravel Corporation* v. *Holland*, 255 F. 2d 304, 6 C.C.A., 1958; *Flowers* v. *Travelers Insurance Co.*, 258 F. 2d 220, 5 C.C.A., 1958.

Conclusion

Plaintiff's prayer for a mandatory injunction is denied.

The Court has examined the record and the testimony and finds that the evidence on which the Commissioner relied amply supported his findings and required the entry of his order awarding compensation. We accept and adopt the findings of the Commissioner as being supported by substantial evidence and grant summary judgment to defendant.

61 Thus Done and Signed in Chambers at Lake Charles, Louisiana, on this the 25th day of October, 1960.

s/ Edwin F. Hunter, Jr.
United States District Judge

Filed October 26, 1960
Alton L. Curtis, *Clerk*

---

[1] Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 73 S. Ct. 302.

[2] Dixie Sand and Gravel Corporation v. Holland, 255 F. 2d 304, 6 C.C.A., 1958; Flowers v. Travelers Insurance Co., 258 F. 2d 220, 5 C.C.A., 1958.

IN THE UNITED STATES DISTRICT COURT

Order Granting Summary Judgment and Dismissal of Complaint—Nov. 3, 1960

This action came on to be heard upon the motions of defendants for Summary Judgment and the Court having given due consideration thereto and having heard the arguments of the respective counsel as contained in their briefs filed with the Court and having concluded that defendants are entitled to Summary Judment dismissing the Complaint, it is therefore hereby

ORDERED that the motions of the defendants for Summary Judgment and Dismissal of the Complaint are hereby granted.

62 THUS RENDERED and SIGNED at Lake Charles, La. on the 3rd day of November 1960.

s/ EDWIN F. HUNTER, JR.
United States District Judge

Filed November 4, 1960
ALTON L. CURTIS, *Clerk*

IN THE UNITED STATES DISTRICT COURT

Notice of Appeal—Filed Nov. 23, 1960

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that plaintiffs, The Travelers Insurance Company and Levingston Shipbuilding Company, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order entered herein on the 3rd day of November, 1960, whereby defendants' Motion for Summary Judgment and Dismissal of the Plaintiffs' Complaint was granted.

The specific point on which an appeal is taken is whether or not, under the facts and circumstances of this case, the death of Rogers D. McGuyer, who received fatal

63 injuries on July 8, 1957, while engaged in new construction for Levingston Shipbuilding Company upon an incompleted drilling barge lying in navigable water, comes within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, or is compen-

sable under the Workmen's Compensation Act of the State of Texas.

DATED this 23rd day of November, A.D. 1960.

STRONG, MOORE, PIPKIN, STRONG & NELSON
By s/ LOUIS NELSON
Attorneys for Plaintiffs, The Travelers Insurance Company and Levingston Shipbuilding Company.
319 McFaddin Building
P.O. Box 1632
Beaumont, Texas

---

75 **Clerk's Certificate**

(Omitted in Printing)

---

76 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:—

THE TRAVELERS INSURANCE COMPANY and
LEVINGSTON SHIPBUILDING COMPANY,

No. 18802. versus

C. D. CALBECK, Deputy Commissioner, Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor, ET AL.

Argument and Submission—May 1, 1961

On this day this cause was called and, after argument by Louis V. Nelson, Esq., for Appellant, and Herman Wright, Esq., and David L. Rose, Esq., Attorney United States Department of Justice, for Appellees, was submitted to the Court.

77 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18802

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY, *Appellants*,

versus

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL., *Appellees*.

Appeal from the United States District Court for the Western District of Louisiana

Opinion—July 13, 1961

Before CAMERON, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: We have again the old, old contest: is the claim for injuries to an amphibious worker under the State Compensation Act? Or is it under
78 the Federal Act?[1] Phrasing it differently, the question is all embracing. As to an occurrence of this type, has there been doubt and uncertainty in the past as to coverage? If not, what is there about contemporary developments which should now make twilight out of that which has been thought to be as clear as day or as black as night?[2] Specifically the question presented is whether a person injured while working on an uncompleted vessel then launched and afloat is navigable waters, but still under construction, is covered by the State Act, or the Longshoremen's Act, or perhaps either one or both depending on the injured party's ultimate choice under the "first-come-first-served"[3] Twilight Zone option?

---

[1] Longshoremen's and Harbor Workers' Compensation Act, 33 USCA §§901-950.

[2] By rare coincidence the identical question is before us in a separate case from a different district. Argued and submitted on the same day, it has been decided this day. Avondale Shipyards, Inc. v. P. J. Donovan, Deputy Commissioner, 5 Cir., 1961, ... F. 2d ....., ... AMC ..... [No. 18,695].

[3] Davis v. Department of Labor of Washington, 1942, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, was so characterized in De Bardeleben Coal Corp. v. Henderson, 5 Cir., 1944, 142 F. 2d 481 at 483.

Again, as we remarked before, "the facts, strikingly simple, neither complex nor conflicting, are not the cause of bewilderment." *Flowers* v. *Travelers Ins. Co.*, 5 Cir., 1958, 258 F. 2d 220 at 224. The Employer operates a shipyard on the Sabine River. At the shipyard it builds new vessels and also repairs completed ships. Its employees, including welders, perform work both on repairs and on construction. There is constant interchange between the two types of work. The Employee McGuyer on July 15, 1957 was injured while working on an oil drilling barge then under construction. The barge had been launched and the superstructure was being built. While McGuyer
79 was welding on the port side of the deck, a tank exploded causing severe head injuries from which he died three days later. The drilling barge had never been used in navigation, and there was still substantial work to be done before it could be so utilized.

In proceedings before the Deputy Commissioner[4] the original Compensation Order made on February 18, 1959, rejected the claim for death benefits filed by the widow and children. The Deputy Commissioner went right to the heart of the matter. As the reason for rejecting the claim, he formally stated that "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

But while that was thought to be the final order it was not. Indeed, a year and a half later the final Award now under review was a complete reversal and held that the Longshoremen's Act did apply. In review proceedings that Order was twice remanded to the Deputy Commissioner.[5] Except that there was an elaboration on essentially incon-

[4] United States Department of Labor, Bureau of Employees' Compensation.

[5] Apparently the Employer took an appeal under 33 USCA §921(b) from the original Order of February 18, 1959. The Court remanded the case for further proceedings for the Deputy Commissioner "to reconsider the question of the situs of injury to be in Orange, Texas." By a modification award on July 30, 1959, the order was amended to show the situs to be Calcasieu Parish, Louisiana. The Order as thus amended, denying benefits for want of coverage, was again brought before the Court. On April 20, 1960, the Court again remanded it to the Deputy Commissioner "in order to permit him to make findings and conclusions in accordance with the facts and the law."

sequential details, the last Award of May 13, 1960, with no explanation for the change of decision, now declared
80 the injury subject to the Longshoremen's Act and made an Award of death benefits. The record, as such, does not spell out this change of heart. On the argument, however, there was general agreement by all counsel that this change in the Deputy Commissioner's decision was largely the result of a like change of view by the Bureau of Employees' Compensation concerning the underlying legal question of coverage for new construction. For reasons we later discuss, we regard this change as significant, not because either counsel or court consider this an intrusion into the independent adjudicatory functions of the Deputy Commissioner, but rather as a convincing demonstration that until these two cases[6] there was no serious contention that new construction work was covered.

While this problem has its genesis in the constitutional travail which gave birth to *Jensen*,[7] which despite severe criticism displays a remarkable tenacity so that each year sees fresh evidence of its continued vitality, *Kossick* v. *United Fruit Co.*, 1961, ... U. S. .... S. Ct. ...., 6 L. Ed. 2d 56, our inquiry is no longer on that level. Now it is simply a question of statutory construction to determine, not how far Congress could have gone, or what Congress had to do, but rather what Congress did.[8]

[6] See note 2, supra.

[7] Southern Pacific Co. v. Jensen, 1917, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086.

[8] To the synopsis in *Flowers*, supra, 258 F. 2d 220 at 221, note 2, may be added that developed in some subsequent cases of this Court. T. Smith & Sons, Inc. v. Williams, 5 Cir., 1960, 275 F. 2d 397 at 398-401; Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F. 2d 794, 1960 AMC 1311, modified on rehearing, 279 F. 2d 75; Noah v. Liberty Mutual Ins. Co., 5 Cir., 1959, 265 F. 2d 547, 1959 AMC 573, overruled on rehearing en banc 5 Cir., 267 F. 2d 218, 1959 AMC 2047; Thibodeaux v. J. Ray McDermott & Co., 5 Cir., 1960, 276 F. 2d 42.

81 That question of statutory construction centers around § 903(a)[9] which defines the coverage of the Longshoremen's Act in terms which are jurisdictional in nature and impact. *Crowell* v. *Benson*, 1932, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598. Precisely the question relates to prerequisite [2] "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

We start with an historic legal fact. In 1922 five years before the enactment of the Longshoremen's Act in response to the constitutionally unsuccessful efforts to adopt state compensation laws for maritime workers, the Supreme Court dealt with this very situation. With *Jensen* then, as now, a matter of everyday preoccupation, the Court held that Oregon could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters. *Grant Smith-Porter Ship Company* v. *Rohde*, 1922, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321. That the line was drawn precisely on uncompleted construction versus repair of a completed vessel is demonstrated overwhelmingly by contemporary cases upholding the supremacy of admiralty and prohibiting the application of state compensation acts to injuries received by those

82 repairing existing vessels.[10] Rejecting the contention of the injured repairman that "when hurt he was doing work of a nature which had no direct relation to navigation or commerce; and to permit application of

---

[9] The numbers in brackets [1] and [2] are inserted to emphasize the two distinctive separate jurisdictional requirements:

33 USCA §903(a). "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if [1] the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if [2] recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

[10] John Baizley Iron Works v. Span, 1930, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819, 1930 AMC 735; Robins Drydock & Repair Co. v. Dahl, 1925, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed. 372, 1925 AMC 182; Great Lakes Dredge & Drydock Co. v. Kierejewski, 1923, 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756, 1923 AMC 441; Gonsalves v. Morse Dry Dock & Repair Co., 1924, 266 U. S. 171, 45 S. Ct. 39, 69 L. Ed. 228, 1924 AMC 1539; Messel v. Foundation Co., 1927, 274 U. S. 427, 47 S. Ct. 695, 71 L. Ed. 1135, 1927 AMC 1047.

the state Workmen's Compensation Act would work no material prejudice to the essential features of the general maritime law as in Grant Smith-Porter Ship Co. v. Rohde * * *," the Court went on to pinpoint the very ground of distinction. "In Grant Smith-Porter & Co. v. Rohde, supra, claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation, and which had not become an instrumentality of commerce." *Baizley Iron Works* v. *Spun*, *supra*, 281 U. S. 222 at 230, 231.

And the line which the Court drew in the pre-1927 days was the line which Congress adopted in §903(a), note 9, supra. The Court itself has said so in the plainest of terms, often repeated.[11] "The main impetus for the longshoremen's * * * Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in §3(a) which would accord with the aim of Congress: the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." *Parker* v. *Motor Boat Sales, Inc.*, 1941, 314 U. S. 244 at 250, 62 S. Ct. 221, 86 L. Ed. 184, 1942 AMC 1.

Of course in this analysis we may not ignore the Twilight Zone concept announced by *Davis*, supra. In effect it holds that where it is difficult to ascertain what the line is,

---

[11] In Davis v. Department of Labor of Washington, 1942, 317 U. S. 249 at 256, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, the Court stated: "In our decision in Parker v. Motor Boat Sales * * * we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction."

Even more recently in Pennsylvania Ry. Co. v. O'Rourke, 1952, 344 U. S. 334, 73 S. Ct. 302, 97 L. Ed. 367, 1953 AMC 237, it first stated, "This Act and the Jones Act provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation." The Court went on to declare: "A quarter of a century of experience has not caused Congress to change the plan. The '*Jensen* line of demarcation between state and federal jurisdiction' has been accepted." 344 U. S. 334 at 337.

or on which side of any such assumed line the facts put a particular case, "an injured waterfront employee" was given "an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred." *Haka* v. *Ross Island Sand & Gravel Co.*, 1959, 358 U. S. 252 at 273, 79 S. Ct. 266, 3 L. Ed. 2d 292. But neither *Davis* nor *Moore*[12] nor *Baskin*[13] were intended to make everything twilight merely because the injury occurred near the waterfront to one who worked in, on, under or around it. The Twilight Zone concept was "devised to solve cases 84 in, not to create, the twilight." *Flowers* v. *Travelers Ins. Co.*, *supra*, 258 F. 2d at 228. Indeed, *Davis* properly understood is a recognition that there are *some* activities and some areas in which the *Jensen* line is clear and distinct. As to those the command of Congress is emphatic: those on the "admiralty" side are exclusively covered by the Longshoremen's Act; those on the "maritime but local"[14] side are state.

There is here more than the normal compulsion to heed the congressional command simply because it is the law. Here there is an imperative necessity. All—courts, judges, counsel, employers and employees in the industrial maritime field, insurers and marine underwriters—deplore the uncertainty in this problem. Recognized, of course, is the inescapable fact that from the nature of this overlapping of state and federal sovereignty, the problem at times is serious and substantial and, like Mordecai at the Gate, simply will not go away. But in those areas—rare as they might be—in which there is clarity, in which the line is

[12] Moore's case, 1948, 323 Mass. 162, 80 N. E. 2d 478, 1948 AMC 1862, affirmed per curiam, sub nom. Bethlehem Steel Co. v. Moore, 1948, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 417.

[13] Baskin v. Industrial Accident Commission, 1949, 338 U. S. 854, 70 S. Ct. 99, 94 L. Ed. 523, reversing, per curiam, 89 Cal. App. 2d 632, 201 Pac. 2d 549; on remand to the state court, 97 Cal. App. 2d 257, 217 Pac. 2d 733, affirmed per curiam, Kaiser Co., Inc. v. Baskin, 1950, 340, U. S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

[14] The *Jensen* problem does not arise unless there is a conjunction of (1) an injury and (2) its occurrence on navigable waters. Where the injuries occur on land or what is deemed an extension of land, the maritime law has no application at all. State Industrial Commission v. Nordenholt Corp., 1932, 259 U. S. 263 at 275-76, 42 S. Ct. 473, 66 L. Ed. 933.

clearly drawn, in which it may be said with some competent assurance that it is either one or the other, effectual enforcement of the socially desirable aim of securing a speedy determinable money indemnity under the operation of automatic self-executing[15] compensation statutes requires that courts have the resourcefulness to ascertain, and
85 when ascertained, the fortitude to stand by the declaration of an identifiable line.

Such considerations have cut a large figure in the disposition this Court has made in two well-defined areas. Where from contemporary action by state courts in the maritime states of this Circuit the pre-existing certainty was imperiled by the beguiling appeal of a free-wheeling election or the assertion that what had been clear was now Twilight, this Court, not without some travail of its own, hewed to the line. Longshoremen, loading or unloading vessels on navigable waters were restored once and for all to the place where Jensen put them. *Noah* v. *Liberty Mutual Ins. Co.*, *supra*, note 8. This stand has more than restored symmetry within the federal establishment of this Circuit. It has, without a doubt, been a substantial factor in the decisions of the state courts. If federal courts who are charged primarily with the immediate responsibility of elucidating the statutory and constitutional principles which inhere in this acute problem of federalism stand fast, it encourages, if not assures, a cohesive, consistent, harmonious treatment by our counterparts in the state judiciaries. Thus, for example, did the confidence in the ultimate rightness of the decision of Louisiana courts, expressed without reservation in *T. Smith & Son, Inc.* v. *Williams*, 5 Cir., *supra*, 275 F. 2d 397, turn out to be well founded. This was accomplished without the aid of the much sought for Federal injunction against prosecution in the state court of claims under the Louisiana Workmen's Compensation Act or the necessity or artful constructions of the anti-injunction statute, 28 USCA §2283. Louisiana has now spoken in terms as positive as *Noah*. Longshore-

---

[15] We have several times outlined the self-executing nature of the Longshoremen's Act. Flowers v. Travelers Ins. Co., supra, 258 F. 2d 220 at 225-27; Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F. 2d 794 at 799-801; and T. Smith & Son, Inc. v. Williams, supra, 275 F. 2d 397 at 400, note 11.

men are not in the Twilight. Longshoremen are in the federal area only. The Louisiana State Compensation Act may not validly apply to them. *Ellis* v. *Travelers Ins. Co.*, 1961, ... La. ....., 129 So. 2d 729; consolidated with *William Stepter* v. *T. Smith & Son, Inc.*, 1961, ... La. ....., 129 So. 2d 740, affirming the Court of Appeals, 123 So. 2d 780 and 788, respectively.

Likewise, in the face of some state court decisions which we have expressly declined to approve or follow, have we spoken in positive terms as to ship repairers. A ship repairer is not in the Twilight. He is in the federal domain. The State Act may not validly apply. *Flowers* v. *Travelers Ins. Co., supra*, 258 F. 2d 220.

It may seem to be unimportant that a restricted category of workers on new construction should be classified so sharply. But it is of such stuff that the certainty so badly needed in the routine operation of any compensation program will come. The converse is true. The moment what has been thought to be daylight or dark now becomes Twilight, the whole process becomes encumbered with the collateral and disruptive controversy which comes to an end authoritatively only after a long struggle culminating in a *Noah* or a *Flowers* decision.

The Supreme Court drew the line. For those working on uncompleted vessels afloat state compensation acts may validly apply. Congress adopted that line in §903(a). There is no shadow. There is no obscurity. There is no uncertainty. It is as clear as it was in 1922 that such injuries are for state compensation.

None of the argument offered to overcome this simple, but positive, lesson of history in action is of any merit. The main contention is that *Grant Smith-Porter Co.* was a "maritime but local" case. Two things are then asserted. The first is that the legislative history, meager and scarce as it is on this point,[16] made no reference to the "local concern" doctrine. This rests in part on the fact that the Committee Report in its statement that maritime workers are "unfortunately * * * excluded from" state laws and that the "Supreme Court has more than once held that Federal legislation cannot,

[16] See the Senate Judiciary Committee Report, S. R. 69 Cong. 1st Sess., Vol. 3, Rep. 973, p. 916; and H. R. 1767, 69 Cong. 2nd Sess., p. 19.

constitutionally, be enacted that will apply State laws to this occupation." cited, in addition to *Jensen*, only the two cases holding Congress could not adapt state legislation.[17] That, it is urged, demonstrates that Congress was not legislating with the other cases in mind. But the Supreme Court has not read the legislative history that narrowly (see note 11, supra and appended text). When reference was made to *Jensen*, Congress thought, just as do judges, courts and lawyers today, of the whole thing turned loose by that auspicious doctrine. Part of that struggle, inherently part and parcel of the compelling supremacy of the admiralty in the areas where uniformity was essential, was the reflex of that—the area in which application of local laws would not work any "material prejudice to the general maritime law." *Western Fuel Co.* v. *Garcia*, 1921 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210.

That concept of maritime but local is still valid.[18] The problem is all wrapped up together. The name
88 *Jensen* is a shorthand abbreviation that embraces all. This is manifest from the very recent declaration by the Court in *Kossick* v. *United Fruit Co.*, 1961, ... U. S. ...., ... S. Ct....., 6 L. Ed. 2d 56 at 62, ... AMC ..... "This brings us, then, to the remaining, and what we believe is, the controlling question: whether the alleged contract, though maritime, is 'maritime and local.' *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242, * * * in the sense that the application of state law would not disturb the uniformity of maritime law, *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 * * *." And in the context of this compensation struggle, like language was used in *Hahn* v. *Ross Island Sand & Gravel Co.*, *supra*, 358 U. S. 272. Of *Davis* the Court said, "* * * we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limitation of *Southern P. Co.* v. *Jensen* * * *." In view of these strong

[17] These were Knickerbocker Ice Co. v. Stewart, 1920, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834; State of Washington v. W. C. Dawson & Co., 1924, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646, 1924 AMC 403.

[18] See note 14, supra.

contemporary recognitions of the vitality of the maritime but local concept and our present "clear duty to consider carefully what the law is on this important and far-reaching question." *River Terminals Corp.* v. *Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922 at 925, 1958 AMC 1534, affirmed and remanded, 1959, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 AMC 1631; 274 F. 2d 36, 1960 AMC 2064, expressions in some of our prior cases cannot be controlling. In several it has been said or implied that the consequence of the enactment in 1927 of the Longshoremen's Act was a congressional declaration that "maritime but local" no longer applied. The reasoning essentially was that by virtue of the Longshoremen's Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter." *Continental Casualty Co.* v. *Lawson*, 5 Cir., 1933, 64 F. 2d 802 at 805, 1933 AMC 794. At another time it was phrased this way. "No ground should be yielded to state jurisdiction in cases falling within the principle of the *Jensen* case * * *." *De Bardeleben Coal Co.* v. *Henderson*, *supra*, 142 F. 2d 481 at 484. But as the recent cases show without doubt, this ignores element (2), see note 9, supra, of the coverage clause. That was made plain in *Davis*, supra. After reviewing the unsuccessful efforts of Congress to adopt state compensation acts, it said of the Longshoremen's Act: "Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.' " 317 U. S. 249 at 252-53. And *O'Rourke* and *Haley* are fresh reminders that element (2) makes the inquiry indispensable. Moreover that inquiry, when made, ultimately has to be in the classic terms embodied in the "maritime but local" formula.[19]

[19] In *Davis* the formula was translated into these terms: "* * * It must be remembered that under the Jensen hypothesis basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity of' maritime law?" *Davis* v. Department of Labor, supra, 317 U. S. 249 at 254.

This analysis disposes, at the same time, of all of the dry-dock or marine railway cases[28] even though plausible
90 arguments from analogy may be constructed that if a marine railway on land is within the coverage, a floating uncompleted hull should likewise be. But these cases do not overcome the categorical pre-1927 holding, adopted by Congress in §903(a), that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be "validly * * * provided by state law."

Nor does *O'Rourke*, supra, require any different result. We pointed out in *Flowers* that this case in the resolution of some of these problems "has, in our judgment, been given altogether too little attention." 258 F. 2d 220 at 223. The case, we stated, "added the further and entirely new concept that where coverage of §903(a) is applicable, the exclusive liability of §905 does not depend on the nature or character of the work being done by the injured employee as long as (1) that injury occurs on navigable waters and (2) the employer is such a person 'any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * *.' §902(4)." 258 F. 2d 220 at 224. But that does not come into play until it is first determined whether the case is within §903(a) and that requires a finding under element (2), see note 9, supra.

As a final thrust it is then insisted that even though "maritime but local" still survives, this is a Twilight case under *Davis*. But what, apart from those very decisions of the two Deputy Commissioners affirmed by two District Courts, brings about the haze of uncertainty? It was clear enough for the Deputy Commissioner to first rule that "It has not been held that the work on an uncompleted vessel

[28] See from this Court: Maryland Casualty Co. v. Lawson, 5 Cir., 1939, 101 F. 2d 732, 1939 AMC 129; Massachusetts Bonding & Ins. Co. v. Lawson, 5 Cir., 1945, 149 F. 2d 853, 1945 AMC 878; Avondale Marine Ways v. Hudson, 7 Cir., 1953, 201 F. 2d 147, 1953 AMC 432, affirmed, 346 U. S. 366, 74 S. Ct. 109, 98 L. Ed. 57, 1953 AMC 1900. Also from other Circuits: United States Casualty Co. v. Taylor, 1 Cir., 1933, 64 F. 2d 521, 1933 AMC 1290, no longer followed, see Travelers Ins. Co. v. McManigal, 4 Cir., 1944, 139 F. 2d 249, 1944 AMC 377, and Newport News Shipbuilding & Drydock Co. v. O'Hearne, 4 Cir., 1951, 192 F. 2d 988; Western Boat Bldg. Co. v. O'Leary, 9 Cir., 1952, 198 F. 2d 409, 1952 AMC 1639.

comes within the provisions of the Longshoremen's
91 * * * Act." For this February 1959 declaration the Administrator acting within the confines of the Fifth Circuit had some fairly substantial, if not infallible, grounds in the expressions which we made in 1958 in *Flowers*. To acknowledge that this statement may perhaps properly be characterized as dicta does not detract from the fact that this Court in drawing the line for ship repairers thought it necessary to consider that group in contrast to those engaged in new construction and in doing so used very positive language. "In contrast to" repair of a completed vessel, we declared, "work on an uncompleted hull before it has become a ship is not under Federal coverage and is, on the contrary, under State jurisdiction: *Grant Smith Porter Ship Co.* v. *Rohde* * * *," 258 F. 2d 220 at 222, note 5.[21]

It is surprising, indeed, that with *Grant Smith-Porter Co.* still very much alive in its 49th year and the Longshoremen's Act now in its 4th decade of operations, a thing as well settled as this has suddenly become confused. *Davis* with all of its "Theoretic illogic," 317 U. S. 247 at 259 (concurring) is, as the Court's decisions reflect, "a practical solution to a practical problem," 358 U.S. 272 at 274 (dissenting). It does not serve that function if it is used as a basis for finding new uncertainty, of creating, not solving, doubt.

92 It is no answer to urge that the distinction at times conceivably may produce results that are extremely fine. That is the inevitable likelihood in dealing with strict jurisdictional lines. The Constitution at times sets up a barrier at the water's edge. It probably does not make much sense from an operational standpoint that a longshoreman injured while handling one end of a bale of cotton on the dock has a state remedy only whereas his counterpart injured when the other end drops while he stands with

[21] It would be doctrinaire to quibble over the phrase "before it has become a ship" as does the Deputy Commissioner's brief in reliance on Tucker v. Alexandroff, 1902, 183 U. S. 424, 22 S. Ct. 195, 46 L. Ed. 264. In any event, in a situation involving the nature of the building of a ship, in contrast to the repair of an existing vessel, the Supreme Court sharply restricted the *Tucker* case. Thames Towboat Co. v. Schooner Francis McDonald, 1920, 254 U. S. 242 at 244, 41 S. Ct. 65, 65 L. Ed. 245.

both feet on the ship's deck must go the federal route. Nor is it any more appealing that a welder fabricating a repair fitting on the dock adjacent to a completed ship is a state case whereas a fellow welder on the ship's deck working on precisely the same fitting must look exclusively to the Longshoremen's Act.

We know by now that nothing written in this field is the last word. All it can be is "the latest word." *T. Smith & Son, Inc.* v. *Williams*, *supra*, 275 F. 2d 397 at 407. Until there is a further word, this Court, for one at least, has three clearcut categories: (1) longshoremen working on a ship and (2) repairmen working on a completed vessel are under the Longshoremen's Act; (3) persons working on an uncompleted vessel afloat but under construction are covered by the state act. Thus do we afford to "these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation * * *"[22] by a proceeding which is certain and swift and virtually self-executing. The congressional policy reflected in element [2] of §903(a) has freed this remedy for these workers from the agony of case-by-case adjudication with the portentous constitutional overtones[23] involved in nearly every such claim and which, for scholars and historians may be interesting, if not decisive, but which hardly offer a solution to the pressing, immediate, urgent problem of the injured worker, his employer and its insurance carrier.

93

The compensation order was not in accordance with law and must be set aside. 33 USCA §921(b).

REVERSED AND RENDERED.

---

[22] S. R. 69th Cong., 1st Sess., Vol. 3, Rep. 973, p. 916; see n. to 16, supra.

[23] This is no better illustrated than in the complex field of maritime death actions. See Thibodeaux v. J. Ray McDermott & Co., 5 Cir., 1960, 276 F. 2d 42 at 47, note 6, and Emerson v. Holloway Concrete Products Co., 5 Cir., 1960, 282 F. 2d 271 at 281, notes 10 and 11 (dissenting) for a summary of the shifting position and alignment of the several Justices; and see Currie, *Federalism and Admiralty, The Devil's Own Mess*, 1960, The Supreme Court Review 158; Baer, *At Sea With The United States Supreme Court*, 38 N. C. L.Rev. 307 (1960).

94 No. 18802.

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY,

versus

C. D. CALBECK, Deputy Commissioner, Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor, ET AL.

Judgment—July 13, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for the appellants, The Travelers Insurance Company and Levingston Shipbuilding Company.

---

97 **(Clerk's Certificate** to foregoing transcript omitted in printing)

---

1 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AVONDALE MARINE WAYS, INC.

VS.

P. J. DONOVAN, Deputy Commissioner Seventh Compensation District, Bureau of Employee's Compensation, U. S. DEPARTMENT OF LABOR and MINUS AIZEN

• • • • • • •

2 **Complaint to Enjoin Compensation Order Under Longshoremen's and Harbor Workers' Compensation Act—Filed February 8, 1960**

1.

Avondale Marine Ways, Inc. is a corporation organized under the laws of Louisiana with its principal offices in

this judicial district; P. J. Donovan is the Deputy Commissioner, Department of Labor, Bureau of Employees' Compensation, Seventh Compensation District with principal offices in this judicial district; Minus Aizen is of the age of majority and is a resident of the Parish of LaFourche, State of Louisiana, in this judicial district. Jurisdiction of this Honorable Court exists under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 901 *et seq.*) and rests on the fact that a Compensation Order was made by the defendant Deputy Commissioner purporting to act under the said statute. The action of the Deputy Commissioner ought to be enjoined, suspended and set aside because the said Deputy Commissioner has no jurisdiction over the claim of Minus Aizen made herein for the reason that the said claim does not come within the purview of the Longshoremen's and Harbor Workers' Compensation Act, but falls exclusively within the coverage of the Louisiana Workmens' Compensation Statute (R. S. 23:1021 *et seq.*).

2.

This complaint is filed for the purpose of reviewing, enjoining enforcement of and setting aside, as not in accordance with the law or the evidence, the Order, Findings of Fact and Award of defendant P. J. Donovan, Deputy Commissioner in Case No. 434-328, dated January 27, 1960 directing plaintiff to pay to defendant Minus Aizen certain benefits under the Longshoremen's and Harbor Workers' Compensation Act commencing on March 17, 1960.

3.

As will more fully appear by the attached copy of the said Compensation Order, which is made part hereof, claimant Minus Aizen was employed by plaintiff at Avondale, Louisiana as a tack welder and on August 11, 1956, while engaged as such in the scope and course of his employment on a barge then under construction, suffered certain personal injuries in an accident.

4.

Plaintiff avers that the hearing before the Deputy Commissioner in which the said Compensation Order was based

was held under a stipulation of fact which shows among other things that at the time of the accident the barge was lying afloat and moored in the Mississippi River and was 57% complete both in man hours and dollar value. Plaintiff further avers that the Deputy Commissioner found as a fact in accordance with the said stipulation that the barge was in an uncompleted status at the time Aizen was injured.

4

5.

Plaintiff avers that valid provision is made in the Louisiana Workmens' Compensation Statute (La. R. S. 23:1035) for compensation for the said injuries to defendant Aizen and that plaintiff has been making since the date of the aforesaid accident and continues to make weekly compensation payments to defendant Aizen in the maximum amount set forth in the said statute.

6.

Plaintiff avers therefore that the Compensation Order and Award complained of are not in accordance with the law and the evidence and are invalid for the reason that the accident on which the award is based took place while defendant was working on new construction and the Deputy Commissioner was therefore without jurisdiction or authority to make or render any Compensation Order or Award.

7.

Plaintiff further avers that if the Longshoremen's and Harbor Workers' Compensation Act be construed to provide compensation in this case, the said construction would render it null and void as beyond the power of Congress to enact under the Constitution of the United States.

8.

Plaintiff has no adequate remedy at law and has no means of obtaining redress of the wrong complained
5 of except through injunction proceedings, mandatory or otherwise, to enjoin, annul and set aside the Compensation Order and Award of compensation complained of herein.

9.

Plaintiff further avers that an interlocutory injunction should be issued to be effective during the pendency of these proceedings restraining enforcement of the said Order for the reason that Minus Aizen is impecunious and that plaintiff would be unable to recover from him any payments made pursuant to the said Compensation Order in the event the same were found to be erroneous by this Honorable Court or on appeal.

WHEREFORE, plaintiff prays that an interlocutory injunction be issued enjoining during the pendency of these proceedings defendants P. J. Donovan, Deputy Commissioner, and Minus Aizen, their agents and servants and all persons acting under or through them, from enforcing the Compensation Order issued on January 27, 1960 in Case No. 434-328 and that upon final decree the said Compensation Order be annulled, reversed, and set aside and its enforcement permanently enjoined, and that an order be rendered denying defendant Minus Aizen compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, and further that plaintiff have and obtain such other orders, decrees and relief as equity, law and the nature of the case may require.

/s/ CHARLES KOHLMEYER, JR.
Charles Kohlmeyer, Jr.

6

/s/ H. MARTIN HUNLEY, JR.
H. Martin Hunley, Jr.
1836 National Bank of Commerce
New Orleans 12, Louisiana
Attorneys for Avondale Marine Ways, Inc., Plaintiff

LEMLE & KELLEHER
Of Counsel

IN THE UNITED STATES DISTRICT COURT

Answer of Minus Aizen—Filed February 24, 1960

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division, and the Judges Thereof:

NOW INTO COURT, through his undersigned counsel, comes defendant, Minus Aizen, and, for answer to the complaint filed herein by the plaintiff, respectfully alleges, avers and shows unto this Honorable Court that:

1.

The allegations of Article 1 of the complaint are denied, except that defendant admits that Avondale Marine Ways, Inc., is a corporation organized under the laws of the State of Louisiana, with its principal offices in this judicial district; that P. J. Donovan is the Deputy Commissioner, Department of Labor, Bureau of Employees Compensation, Seventh Compensation District, with principal offices in this judicial district; that Minus Aizen is of the full age
7 of majority and a resident of the Parish of La-Fourche, State of Louisiana, in this judicial district; that the jurisdiction of this Honorable Court exists under the provisions of the Longshoremen's & Harbor Workers' Compensation Act; and that a compensation order was made by the aforementioned Deputy Commissioner under said statute;

2.

Article 2 of the complaint is denied except that the defendant admits that an order, findings of fact and an award of compensation was made by the Deputy Commissioner in favor of the defendant, Minus Aizen, which said order, findings of fact and award of compensation, your defendant respectfully avers, are the best evidence of their contents;

3.

The allegations of Article 3 are admitted;

4.

The allegations of Article 4 are admitted;

5.

The allegations of Article 5 of the complaint are denied, except that the defendant admits that the plaintiff has been paying him $35.00 per week since the date of his injury on August 11, 1956;

6.

The allegations of Article 6 of the complaint are denied;

8 7.

The allegations of Article 7 of the complaint are denied;

8.

The allegations of Article 8 of the complaint are denied, except that the defendant admits the right of the plaintiff to have the compensation order of the Deputy Commissioner reviewed in accordance with applicable provisions of law;

9.

The allegations of Article 9 of the complaint are denied.

NOW, FURTHER ANSWERING THE COMPLAINT HEREIN FILED, DEFENDANT, MINUS AIZEN, RESPECTFULLY FURTHER AVERS AND ALLEGES THAT:

10.

Defendant repeats, realleges and reavers, with the same force and effect as though it were repeated herein in toto and in extenso, each and every allegation of fact contained in the stipulation of facts included in the record before the Honorable Deputy Compensation Commissioner, Seventh Compensation District, in the case entitled "In the Matter of the Claim for Compensation under the Longshoremen's & Harbor Workers' Compensation Act, on account of claim of Minus Aizen, Employee, versus Avondale Marine
9 Ways, Inc., Employer, Self-Insured", bearing the case No. 434-328, certified copy of which has been ordered filed in the record of this cause by this Honorable Court on February 8, 1960;

11.

The compensation order and award of the Deputy Commissioner filed on the 27th day of January, 1960, is valid, lawful and in accordance with the provisions of the Longshoremen's & Harbor Workers' Compensation Act.

WHEREFORE, defendant, Minus Aizen, prays that, after due proceedings had, there be judgment herein in his favor and against the plaintiff, affirming the said compensation order and award of the Deputy Commissioner filed on the 27th day of January, 1960, and dismissing these proceedings at plaintiff's cost; and defendant further prays for all such other and further general and equitable relief as to this Honorable Court may seem just in the premises.

RAYMOND H. KIERR
SAMUEL C. GAINSBURGH
By: /s/ Samuel C. Gainsburgh
Attorneys for Defendant,
Minus Aizen
1746 National Bank of Com. Bldg.
New Orleans 12, Louisiana

IN THE UNITED STATES DISTRICT COURT

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted—Filed April 7, 1960

The defendant P. J. Donovan, by Assistant United
10 States Attorney Francis G. Weller, hereby moves the court to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted, in support of which defendant relies on the pleadings and documents filed heretofore in this case, including the transcript of the hearing before the deputy commissioner, the exhibits attached thereto and the compensation order and award.

/s/ FRANCIS G. WELLER
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

Motion of Defendant, Minus Aizen, for a Summary Judgment—Filed April 18, 1960

NOW INTO COURT, through his undersigned counsel, COMES MINUS AIZEN, a defendant herein, and

ON SUGGESTING TO THE COURT THAT:

1. A reference to this record will disclose that there is no dispute concerning any material fact, all of which such facts were and are the subject of a stipulation entered into between Mover and the Plaintiff, now a part of the record in this cause; and

2. The only questions presented herein are of law;

MOVES THIS HONORABLE COURT, upon the basis of the pleadings, exhibits and stipulations presently comprising the record in this cause, FOR A SUMMARY JUDGMENT DISMISSING THE PLAINTIFF'S ACTION AT ITS COST.

Respectfully submitted,

RAYMOND H. KIERR
SAMUEL C. GAINSBURGH
BY: /s/ SAMUEL C. GAINSBURGH
Samuel C. Gainsburgh
1746 National Bank of Comm. Bldg.
New Orleans 12, La.
Attorneys for Defendant,
Minus Aizen

IN THE UNITED STATES DISTRICT COURT

Plaintiff's Motion for Summary Judgment Under Rule 56—Filed April 28, 1960

Plaintiff, Avondale Marine Ways, Inc. moves the court for a summary judgment under Rule 56 in its favor on the ground as more fully set out in the petition that defendant P. J. Donovan, Deputy Commissioner, has no jurisdiction over the claim and on the ground that defendant Minus Aizen had elected to receive benefits under the Louisiana Workmen's Compensation Statute and is barred from pro-

ceeding under the Longshoremen's and Harbor Workers' Compensation Act; and on the further ground that a construction of the Longshoremen's Act to cover Aizen's claim would render it unconstitutional.

Mover further avers that there is no material issue of fact unresolved in this case inasmuch as the matter was submitted to the Deputy Commissioner upon a stipula-
12 tion of fact which forms a part of the record filed by the said Commissioner herein in response to an order of this Honorable Court.

/s/ Charles Kohlmeyer, Jr.
Charles Kohlmeyer, Jr.

/s/ H. Martin Hunley, Jr.
H. Martin Hunley, Jr.
1836 National Bank of Commerce
New Orleans 12, Louisiana
Attorneys for Plaintiff
Avondale Marine Ways, Inc.

Lemle & Kelleher
Of Counsel

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Proceedings Before the Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation—Case No. 434-328—Filed March 11, 1960

CERTIFICATE

This is to certify that the attached proceeding before the Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation, in the matter of:

Name of Proceeding: Minus Aizen, Claimant;
against Avondale Marine Ways, Inc., Employer,
13 Self-Insurer
Case No.: 434-328 Place: New Orleans, Louisiana
Date: October 23, 1959

was held as therein appears and that this is the original transcript thereof for the files of the U. S. Department of Labor.

ACE REPORTING COMPANY

Official Reporters

By: /s/ CARL A. HUDSON
Carl A. Hudson

---

14 U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Case No. 434-328

MAXUS AIZEN, *Claimant*

vs.

AVONDALE MARINE WAYS, INC., *Employer*
SELF-INSURER, *Carrier*

Pursuant to notice, this matter was heard before the Hon. P. J. Donovan, Deputy Commissioner for the Seventh Compensation District, in Room 311a, Masonic Temple Building, 333 St. Charles Avenue, New Orleans, Louisiana, on Friday, October 23, 1959, commencing at 10:00 a.m.

APPEARANCES:

For the Claimant:
Samuel C. Gainsburgh, 1746 Nat'l Bank of Commerce Bldg., New Orleans 12, Louisiana.

For the Respondents:
H. Martin Hunley, Jr., 1836 Nat'l Bank of Commerce Bldg., New Orleans, Louisiana.
Charles Kohlmeyer, Jr., 1836 Nat'l Bank of Commerce Bldg., New Orleans, Louisiana.

PROCEEDINGS

The Deputy Commissioner Donovan: Let the record show that this hearing began at 10:00 a.m., Friday, October 23, 1959, and is being conducted in Room 313a, Masonic Temple Building, 333 St. Charles Avenue, New Orleans, Louisiana, which is the headquarters office of the Seventh District Bureau of Employees' Compensation, U. S. Department of Labor. The hearing at this time is being held at the request of the Claimant, Minus Aizen, 601 Magnolia Street, Thibodaux, Louisiana. The Employer, a self-insured employer, under Longshoremen's and Harbor Worker's Act is Avondale Marine Ways, Inc., P. O. Box 1030, New Orleans 8, Louisiana. The claimant is not present in person at this hearing.

Mr. Gainsburgh: He is.

16 The Deputy Commissioner: He is. Correction. The Claimant is present in person at this hearing and is represented by attorney Samuel C. Gainsburgh of the law offices of Raymond H. Kierr, National Bank of Commerce Building, New Orleans, Louisiana. Attorney Falgout, 205 W. 5th Street, Thibodaux, Louisiana, is associate counsel with the law offices of Mr. Kierr.

The Employer is represented at this hearing by attornies H. Martin Hunley and Charles Kohlmeyer, Jr. of the law office of Lemle and Kelleher, National Bank of Commerce Building, New Orleans, Louisiana.

The informal file before the Deputy Commissioner shows that on November 13, 1958, the Claimant filed formal claim with the Deputy Commissioner, claiming benefits under the Longshoremen's and Harbor Worker's Compensation Act because of injuries sustained August 11, 1956, while in the employe of Avondale Marine Ways, Inc. At that time the employer had not reported the injury to the Deputy Commissioner and, at the request of the Deputy Commissioner, the employer then presented all information available to them. Subsequently, informal discussion were conducted in the office of the Deputy Commissioner, after which the parties agreed to stipulate to the facts. It appears unnecessary for the Deputy Commissioner to engage in any detailed recitation of the facts in connection with the case, because such facts are well defined in the stipula-

tion, which is to be entered into evidence. Various
17 exhibits referred to in the stipulation will also be entered in evidence, with the possible exception of the various medical reports referred to therein. I state this possible exception because the stipulation itself indicates that parties are in agreement, that as a result of the injury, the claimant is permanently and totally disabled. However, if either of the parties desire that such medical reports be made a part of this record, I shall interpose no objection.

On the basis of earlier informal discussions, and on the basis of stipulation of facts, it is my understanding that the only issue at this time is whether the claim should properly come within the jurisdiction of this office, in the administration of the Longshoremen's and Harbor Workers' Compensation Act, or whether the case properly belongs under the State of Louisiana Compensation Act. However, in order that the parties may fully state their respective positions, I now ask Attorney Gainsburgh to briefly state the claim, with the understanding, of course, that the stipulation as well as various other documents are to be admitted into the record. Mr. Gainsburgh, will you now state the claim?

Mr. Gainsburgh: Mr. Commissioner, may I ask whether it was your intention that I should enter in the case at this time the documents into the record, or simply state the nature of our claim, for the purposes of the record.

18 The Deputy Commissioner: I believe you should state the claim prior to the introduction.

Mr. Gainsburgh: This is a claim by Minus Aizen for compensation benefits as a result of permanently and totally disabling injuries which he sustained on August 11, 1956, while employed as a welder by the employer in this matter. At the time of his injuries, the claimant was aboard a barge, which was afloat in waters of the Mississippi River, in or adjacent to the Greater New Orleans Area, Louisiana. The employer in this case, Avondale Marine Ways, Inc., employs persons engaged in repairs, engaged in construction and in repairs, of vessels. This claim is based upon the contentions that the claimant on August 11, 1956, while in the course and scope of his said employment as a welder and while aboard a vessel afloat in navigable waters of the

United States, sustained the aforementioned and character of injuries which for he is entitled to be paid under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. That is essentially the statement of our claims, sir.

The Deputy Commissioner: Mr. Hunley, will you please state for the record the basis on which you resist the claim?

19 Mr. Hunley: The Claimant was employed by Avondale on August 11, 1956, when he was injured. On that date, he was injured while working on an uncompleted drilling barge, which was, at that time, moored in a float in the Mississippi River. This barge was being constructed by Avondale while under the private contract of an ultimate purchaser, and had been partially constructed on Avondale's Ways adjoining the Mississippi River. It had been launched in an uncompleted state on July 26, 1956, towed by an independent contractor about 200 feet from the Ways and within the confines of the Avondale plant, and there moored for completion. The claimant at the time of his injury was employed as a welder, and had been so employed by Avondale on and off since July 2 of 1952. He actually worked until January 7, 1953, and then came back to work for Avondale on December 12, 1955, and worked continuously until his injury of August 11, 1956. The claimant had worked solely on new construction, and had performed no work on repair jobs on completed vessels. All the work which he had performed for Avondale was performed on land with the exception of the work being done when he sustained the injuries on August 11, 1956.

Following his injury, Avondale commenced the payment to the claimant of $35 a week, the maximum amount of compensation allowable under the Louisiana State Workmen's Compensation Act. Since the date of his injury and up to the present date, he has been paid this $35 a week by checks, which clearly show on their face

20 that they represent payments under the Louisiana State Compensation law. No deductions for social security, unemployment or withholding taxes were made. In addition to the weekly benefits paid under the State's Compensation Statute, Avondale also paid from the date

of the injury to the present date approximately $7,000 in doctors, hospital and other medical expenses for the account of the claimant. In addition to that, those amounts paid in compensation and for medical expenses, Avondale, upon a plead of financial hardship by the claimant, advanced to him the sum of $3,830 by checks from the time of his injury until the date this stipulation was filed. The checks were clearly marked "Advance on Compensation" and was subject to no deductions of any kind. The vessel on which the claimant was working at the time of his injury was completed and delivered to the purchaser on November 17, 1956, and at the time of his injury, the barge was 57 percent completed, both in man hours and in dollar volume.

The position of the employer in this case is that the Commissioner has no jurisdiction over this claim, inasmuch as the claim comes under the Louisiana Workmen's Compensation statute, which is already being observed by the employer, and does not come under the Longshoremen's and Harbor Workers' Act. The ground for this contention is that the claimant was, at the time of his injury, working on new construction, a barge 57 percent complete. Hence the claim is not compensible under the Longshore-
21 men's Act. An alternative contention is made by the employer that Aizen has elected to come under the state act by accepting workmen's compensation payments, medical expenses, and advances thereon for two years approximately before the claim was filed with the Commissioner.

In the event we were found responsible under the Act, we would anticipate that credit be given Avondale Marine Ways for all amounts paid the claimant as afore-said under this compensation statute.

Mr. Gainsburgh: Mr. Commissioner, may I reply to that portion of the employers defense which was not directly adverse to our statement of the case, that is, with respect to election and prescription?

The Deputy Commissioner: I have heard no issues in respect to prescription.

Mr. Hunley: No, just the election.

Mr. Gainsburgh: I would amend that request, sir, for permission to state our position with respect to election.

The Deputy Commissioner: I believe that would be entering the field of argument, don't you, Mr. Gainsburgh?

22 Mr. Gainsburgh: I withdraw the question.

The Deputy Commissioner: Before proceeding to submit documents in evidence, Mr. Hunley does the approximately $7,000 paid by the employer for medical and other services include all medical and hospital treatment and care that has been required by the claimant to date?

Mr. Hunley: It included that hospital and medical care up to the date of the filing of the stipulation. I don't believe, as far as I know, that there has been none since that date, paid by Avondale. You might ask the claimant.

The Deputy Commissioner: In other words, it is your understanding that the employer has provided all necessary medical and hospital treatment and care up to the date?

Mr. Hunley: That is correct. That is our contention.

The Deputy Commissioner: I have one other question. In respect to the advance of $3,830 or advances, do you know the total amount of compensation paid by the employer, including that $3,830?

Mr. Hunley: I don't know the exact figure, but it would be $35 per week from the date of the accident to the present time.

23 The Deputy Commissigner: In the event that we should make an award under this Act we shall then ask Mr. Ewing Moore to give us that figure.

Mr. Hunley: That can be furnished and there will be no dispute about that.

The Deputy Commissioner: All right. We are prepared to receive evidence in behalf of the claimant. Mr. Gainsburgh? I hand you the original form, claim form, U. S. 203 filed by the claimant with this office November 13, 1958, and a copy of that has been prepared by this office. Will you observe it and then refer it to Mr. Hunley and Mr. Kohlmeyer for their observation? I would like to have that claim as a part of the record. It should be a claimant's exhibit.

Mr. Gainsburgh: On behalf of claimant's counsel for the claimant, offers and introduce and file in evidence form 203, Employees claim for compensation, with the request that it be marked Claimant No. 1 for Identification.

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, you have observed the Claimant No. 1 and have no objection?

Mr. Hunley: We have no objection.

24 The Deputy Commissioner: Upon request of counsel for claimant, and by agreement of counsel for the respondent, it is admitted in evidence, identified as claimant's exhibit No. 1, the bureau standard form 203, executed by the claimant on November 7, 1958, and received in the office of the deputy commissioner on November 13, 1958.

(The document in question was received in evidence and was marked Claimant's Exhibit No. 1.)

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, I show you form U.S. 215, which is the employers answer to the claim, the original and a copy prepared by this office, and after you observe that, will you please refer it to Mr. Gainsburgh for observation.

Mr. Hunley: I offer that document, being answer of the employer, marked Avondale 1.

The Deputy Commissioner: Are you in agreement, Mr. Gainsburgh?

Mr. Gainsburgh: We have no objection to the offer of that document.

The Deputy Commissioner: At the request of counsel for the respondent and without objection on the part of counsel for the claimant, there is admitted in evi-

25 dence, identified as Respondent's Exhibit A the bureau standard form US 215, "Answer of employer of insurance carrier to employees' claim for compensation."

(The document in question was received in evidence and was marked Respondent's Exhibit A.)

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, this is a letter dated November 29, 1958, addressed to this office by Mr. Ewing Moore, Insurance Director for the Employer, with attached employers report on bureau standard form US 202, and I also hand you a report dated December 31, 1958, which is a job status report as of August 11, 1956, prepared by Mr. Ferguson of the Cost

Analysis branch. Will you please observe them and then refer them to Mr. Gainsburgh for his observation?

Mr. Hunley: This job status report that you refer to is a status report on the barge on which the claimant was working at the time he was injured.

The Deputy Commissioner: That is correct.

Mr. Hunley: I would like to offer the letter of Mr. Moore referred to, dated November 29, 1958, to the U. S. Department of Labor, New Orleans, marked Respondent's B, the attached form US 202, executed by Mr. Ewing Moore,
26 marked Respondent's C, and the report on status of the job as of August 11, 1956, by C. W. Ferguson at Avondale Marine Ways marked Respondent's D.

Mr. Gainsburgh: May I be allowed to go off the record for just a moment?

The Deputy Commissioner: Yes.

(Discussion off the record.)

The Deputy Commissioner: On the record. Do you have any objection?

Mr. Gainsburgh: The only objection I would care to make, sir, would be to the materiality of this analysis statement or the relevancy of it, in view of the stipulation, because it just contains the same information.

The Deputy Commissioner: That is correct. It contains practically the same information. However, there are certain other evidence that is being admitted in here that is also contained in the stipulation. My suggestion for admitting those various documents is to have this record as complete as possible, and in the event that is might become necessary for any future reviews, the reviewing authorities should have as complete a picture as possible.

27 Mr. Hunley: I would simply like to point out that this exhibit is the status of work and is part of the stipulation, paragraph 7.

The Deputy Commissioner: That is correct.

Mr. Gainsburgh: Along those lines, the first paragraph of the stipulation provides that it is stipulated and agreed reserving the right for each party to object to any of the stipulations made here and after on the grounds of rele-

vancy, materiality or admissibility. So, my objection would be within that reservation. But, in view of the Commissioner's statement, I will withdraw the objection.

The Deputy Commissioner: All right. At request for counsel for the Respondent and without objection on the part of counsel for the claimant, there is admitted into evidence identified as Respondent's B, a letter dated November 29, 1958, addressed to the Deputy Commissioner by Mr. Ewing V. Moore, Insurance Director for the Employer. Under the same conditions there is admitted as Respondent's Exhibit No. C, standard form US 202, employers first report of injury, which was submitted to the bureau with the employer's letter of November 29, 1958, and at the request of the Deputy Commissioner.

28 Under these same conditions, there is admitted in evidence, identified as Respondent's Exhibit D, a job status report as of August 11, 1956. This report is dated December 31, 1958, and prepared by C. W. Ferguson, Cost Analysis Branch, Production Department of the Employer, and is understood to be a job status report covering the status of the drilling barge on which the claimant was engaged at the time of the injury.

(The documents in question were received in evidence and marked Respondent's Exhibit No. B, Respondent's Exhibit No. C and Respondent's Exhibit No. D respectively.)

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, I show you a letter dated November 17, 1958, addressed to the Employer by the Deputy Commissioner requesting that the employer submit a report to this office, and it was in response to this particular letter that Mr. Ewing Moore addressed his letter of November 29, 1958, to this office, with the employers report on form US 202. I propose to admit that letter of November 17, 1958, as Deputy Commissioner's Exhibit, if there are no objections.

Mr. Gainsburgh: None by the claimant.

Mr. Hunley: No objections.

The Deputy Commissioner: Counsel for the parties have observed the letter dated November 17, 1958,

29 addressed to the employer by the Deputy Commissioner, and indicating no objection, this document is

admitted into evidence, identified as Deputy Commissioner's Exhibit No. 1.

(The document in question was received in evidence and marked Deputy Commissioner's Exhibit No. 1.)

The Deputy Commissioner: I hand to counsel for the parties an undated stipulation of 4 pages which was received in the office of the Deputy Commissioner on April 16, 1959. It is my understanding that counsel for the parties are in agreement to have this stipulation admitted into evidence. Is that correct, Mr. Gainsburgh?

Mr. Gainsburgh: That is correct, Mr. Commissioner.

Mr. Hunley: Yes.

The Deputy Commissioner: By agreement of the parties, there is admitted into evidence identified as Deputy Commissioner's Exhibit No. 2 an undated stipulation of four pages executed by attorney Charles Kohlmeyer, Jr., and attorney H. Martin Hunley, Jr., of the law offices of Lemle and Kelleher, on behalf of the employer, and executed by Samuel Gainsburgh, attorney of the law offices of Raymond Kierr, on behalf of the Claimant.

30 (The document in question was received in evidence and was marked Deputy Commissioner's Exhibit No. 2.)

The Deputy Commissioner: Mr. Hunley, in order that—

Mr. Hunley: All of these documents are admitted, of course, subject to my intention made at the beginning, that the Commissioner does not have jurisdiction over this claim.

The Deputy Commissioner: I understand that to be your position, yes. Mr. Hunley, in stating that the employer had made advance payments of $3,830 to the Claimant, it is my understanding that those advances of $3,830 are in addition to regular weekly payments of the $35 per week, is that correct?

Mr. Hunley: That is correct.

The Deputy Commissioner: Mr. Gainsburgh, do you have any further evidence to submit in this case?

Mr. Gainsburgh: Mr. Commissioner, we have no further factual evidence to submit.

The Deputy Commissioner: Mr. Hunley, does the employer have any further evidence to submit?

31 Mr. Hunley: No, no, we do not.

The Deputy Commissioner: I would understand, then, that both parties rest. Mr. Gainsburgh, you are in agreement, are you not.

Mr. Gainsburgh: I am.

The Deputy Commissioner: You are, Mr. Hunley?

Mr. Hunley: Yes.

The Deputy Commissioner: The record will show that this hearing is closed at 10:45 a.m., October 23, 1959. The decision is reserved.

(Thereupon the instant hearing was closed.)

Claimant's #1

Form US-203

Received
Nov. 13, 1958
District No. 7

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Office of Deputy Commissioner 311 Masonic Temple Bldg., New Orleans 12, La.

Administering Longshoremen's and Harbor Workers' Compensation Act.

Case No. 434-328
Insurance
Carrier's No. 1207

32 EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with Sections 13 and 19 of the law)

1. Name of employee Minus Aizen
Employee's Check No. .....

2. Address: Street and No. 601 Magnolia
City or town Thibodaux, La.

INJURED PERSON

3. Sex Male Age 25 Married, single, widowed married

4. Do you speak English? Yes
Nationality American

5. State regular occupation Assistant Welder

6. What were you doing when injured? Pulling come-along to place steel in proper place to weld.

7. (a) Wages or average earnings per day, $14.88 (Include overtime, board, rent, and other allowances.) (b) Per week, $89.28 (c) Were you employed elsewhere during week in which you were injured? No. (d) If so, state where and when .....

8. Were you paid full wages for day of accident? Not known

---

9. Employer Avondale Marine Ways, Inc.

EMPLOYER

10. Office address: Street and No. P. O. Box 1030
City or town New Orleans 8, La.

11. Nature of business Shipbuilding and repair.

---

12. Place where injury occurred Avondale Marine Ways, on barge floating on Mississippi River.

THE INJURY

13. Name of foreman Harry Riddles

14. Date of accident or first illness, the 11th day of Aug., 1956, at 10:00 o'clock A.M.

15. How did accident happen or how was occupational disease caused? Eye-lug welded to pipe which I was placing on barge in proper

33

position with come-along broke causing piece of steel to hit me in the head knocking me off scaffle onto floor of barge and then into the Mississippi River.

16. State fully nature of injury or occupational disease: Multiple fracture of skull, broken left wrist, left arm, and left hip.

17. On what date did you stop work because of injury? August 11, 1956.

18. Have you returned to work? (Yes or No) No If "yes", on what date? ....., 195.....

NATURE AND EXTENT OF INJURY

19. Does injury keep you from work? (Yes or No) Yes

20. Have you done any work in period of disability? No

21. Have you received any wages since injury? No. If so, from and to what date? .....

22. Has injury resulted in amputation? No. If so, describe same .....

23. Did you request your employer to provide medical attendance? Yes. Has he done so? Yes

24. Attending physician: Name D. J. Farley Address New Orleans, La.

25. Hospital: Name So. Baptist Hospital Address New Orleans, Louisiana

26. Have you given your employer notice of injury? (Yes or No) No When? ....., 195.....

NOTICE

27. If such notice was given, to whom? Employer had notice at time of injury.

28. Was it given orally or in writing? Notice obtained from knowledge of other employees.

34 I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by /s/ MIXUS AIZEN
Claimant
Mail address 601 Magnolia St.,
Thibodaux

Dated November 7, 1958

Respondent's Exhibit A

Form US-215

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Office of Deputy Commissioner 311 Masonic Temple Bldg., N. O., La.

Administering Longshoremen's and Harbor Workers' Compensation Act.

Received Dec. 1, 1958 Case No. 434-328
District No. 7. Insurance Carrier's No. .....

ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR COMPENSATION

MIXUS AIZEN, *Claimant*

vs.

AVONDALE MARINE WAYS, INC., *Employer*
Self-Insured, Insurance Carrier

35 The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is denied that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of the injury.

4. It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that notice of injury was given employer as specified in application.

6. It is admitted that applicant was permanently disabled to the extent stated in application.

7. It is admitted that applicant was temporarily disabled for the period stated in application.

8. It is admitted that the rate of wages as set forth in application is correct.

9. .....

AVONDALE MARINE WAYS, INC.
Signed /s/ EWING V. MOORE
Insurance Director

Note:—The employer or insurance carrier should
36 answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

Respondent's Exhibit B

Received
Dec. 1, 1958
District No. 7

AVONDALE MARINE WAYS, INC.
P. O. Box 1030
New Orleans, Louisiana

November 29, 1958

U. S. Department of Labor
Bureau of Employees Compensation
Masonic Temple Building
New Orleans, Louisiana

Attention: Mr. P. J. Donovan
Deputy Commissioner

Re: Minus Aizen, employee
Injured: August 11, 1956
Your File No. 434-328

Gentlemen:

This will acknowledge your letter of November 17, 1958 regarding the above case.

We are returning herewith Form US-202, Employer's First Report of Injury. You mention in your letter that the submission of this form does not necessarily indicate your office has jurisdiction, and it is being submitted on that basis.

Also attached is original copy of Form US-215, Answer to Employee's Claim. You will note in our answer to Items 6 and 7 on Form US-215 that we have admitted the allegations regarding disability. Inasmuch as we agree Mr.
37 Aizen is now totally disabled, we are not sending you any of the medical reports at this time.

As you requested, copies of the information given you is being sent to the Law Offices of Raymond H. Kierr, 1746

National Bank of Commerce Building, New Orleans 12, Louisiana.

We shall await further word from you on the matter.

Very truly yours,

AVONDALE MARINE WAYS, INC.
/s/ EWING V. MOORE
Ewing V. Moore
Insurance Director

EVM:dl
cc: Attorney Samuel C. Gainsburgh
Law Offices of Raymond H. Kierr

Respondent's Exhibit C

Received
Dec. 1, 1958
District No. 7

AVONDALE MARINE WAYS, INC.
INSURANCE DEPARTMENT
WESTWEGO, LA.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner New Orleans, Louisiana

Administering Longshoremen's and Harbor Workers' Compensation Act.

EMPLOYER's FIRST REPORT TO DEPUTY COMMISSIONER OF ACCIDENT OR OCCUPATION DISEASE

(To be submitted in duplicate to Deputy Commissioner who will forward copy to Commission)

EMPLOYER

1. Employer's name Avondale Marine Ways, Inc.
2. Office address Avondale, Louisiana
3. Nature of business Marine Construction and Repair
4. Insurance carrier Self

82

38

6. Full name of injured person Minus Aizen Check No. 1269

7. Address: Street and No. 601 Magnolia St. City or town Thibodeaux, La.

8. Sex Male Age 25 Speak English Yes If not, what language .....

INJURED PERSON

9. Injured person's regular occupation Tack Welder

10. Was he injured in regular occupation? Yes If not occupation when injured .....

11. Wages or average earnings per day $16.24 per week $..... (Include overtime, bonuses, etc.)

12. Working days per week 5½ Any other advantage? .....

13. Length of service in occupation 5 yrs. Were full wages paid for day of injury .....

14. Place where injury occurred Delta Drilling Barge (Give place and name of vessel)

15. Name of foreman Emile Foret

16. Date of accident or first illness 8 11 56 Last day worked 8 11 56
(month, day, year)

THE INJURY

17. When did you or your foreman first have knowledge of injury? Immediately

18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Was placing eye-lug welded to pipe on barge in proper place with come-along which broke causing piece of steel to hit him in the head knocking him off scaffold onto barge below and into the river.

19. Machine, too, or thing in connection with which accident or disease occurred .....
(If machine indicate part)

39

20. Nature of injury or occupational disease Fractured skull, brain damage, fractured right forearm, general body contusions

21. Was member or part of member lost? No

22. Will injury probably result in serious head or facial disfigurement? No

NATURE AND EXTENT OF INJURY

23. Did injury cause of loss of time? Yes
If "yes" on what date? 8 11 56

24. Has injured person returned to work? No
If "yes" on what date? .....

25. Did you provide or authorize medical attention? Yes When? Immediately

26. Physician Dr. D. J. Farley, Pere Marquette Building, New Orleans, La.
Dr. Howard H. Karr, 1520 Louisiana Ave., N.O., La.

27. Hospital Baptist Hospital

Firm Name AVONDALE MARINE WAYS, INC.

Signed EWING V. MOORE
Insurance Director

Unless the above report shows that the injured is no longer disabled, then a supplementary report on "Employer's Supplementary Report of Injury" Form (US-211) must be made at the termination of disability, or at the end of fifteen days if disability has not then ended.

Respondent's Exhibit D

Job 8702
Elevated Deck Drilling Barge
Delta Offshore Drilling Co.

Received
Apr. 16, 1959
District No. 7

Status of Job 8-11-56 December 31, 1958

40	Spending Thru	Final Total	% Complete
	8-11-56	12-4-56	8-11-56
Engineering	3,322.0 MH	4,123.0 MH	80.6%
Moldloft	567.0	567.0	100.0%
Prod. Engr.	683.0	1,126.0	60.7%
Cranes	5,053.0	7,953.0	63.5%
Hull	18,049.0	18,301.0	98.6%
Bow Wedge	1,672.0	3,343.0	50.0%
Pontoons	3,716.0	3,716.0	100.0%
Rams, Columns & Braces	3,733.0	3,776.0	98.9%
Superstructure	8,789.0	14,288.0	61.5%
Piping	5,762.0	13,638.0	42.2%
Machinery	1,158.0	4,794.0	24.2%
Electrical	614.0	6,904.0	8.9%
Sheetmetal	2,486.0	4,720.0	52.7%
Joiner	0	2,319.0	0
Insulation	74.0	1,009.0	7.3%
Fittings	5,682.0	13,916.0	40.8%
Clean & Paint	2,772.0	5,133.0	54.0%
General	9,173.0	18,169.0	50.0%
Outfitting	90.0	1,239.0	7.3%
Jigs	338.0	741.0	45.6%
Errors	737.0	2,531.0	29.1%
Purchasable Items	5,716.0	6,593.0	89.8%
Extras	2,781.0	6,329.0	43.9%
TOTAL MANHOURS	82,967.0 MH	145,228.0 MH	57.1%
TOTAL DOLLARS	$195,443.00	$341,880.00	57.2%

CONSTRUCTION CHRONOLOGY

Keel Laid	4-16-56
Launched	7-26-56
Delivered	11-17-56

/s/ C. W. FERGUSON
C. W. Ferguson
Cost Analysis Branch
Production Department

CWF/rt

EXHIBIT "C"

Deputy Commissioner's Exhibit #1 Attached to Foregoing Proceedings

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT
SEVENTH COMPENSATION DISTRICT
311 MASONIC TEMPLE BUILDING, 333 ST. CHARLES AVE.
NEW ORLEANS 12, LA.

Refer to File No.
434-328

November 17, 1958

Avondale Marine Ways, Inc.
P. O. Box 1030
New Orleans, La.

Re: Minus Aizen, employee
Injured: August 11, 1956

Gentlemen:

Please refer to my letter of October 17, 1958 and your reply dated October 22, 1958 relative to the caise of Minus Aizen, injured August 11, 1956, while in your employ.

Enclosed please find copy of Form US-203 executed by the employee on November 7, 1958 and received in this office November 13, 1958. There are also enclosed blank forms US-215 on which you may prepare your reply to this claim, returning the original to this office and a copy to the employee.

Inasmuch as the employee has filed claim under this Act, please submit the Form US-202, Employer's First Report of Injury. As you are aware, the transmittal of Form US-202 is not in itself an acknowledgement of jurisdiction by this office. It is also requested that you furnish us a copy of all the medical reports received by you to date.

For your information, the employee is represented by the Law Offices of Raymond H. Kierr, 1746 National Bank of Commerce Building, New Orleans 12, Louisiana, and Mr. Kierr's office should be furnished a copy of all information submitted to this office.

After we have received the above requested information, an informal conference will be scheduled.

Very truly yours,

/s/ P. J. Donovan
P. J. Donovan
Deputy Commissioner

PJD mas
cc: Attorney Samuel C. Gainsburgh,
Law Offices of Raymond H. Kierr
1746 National Bank of Com. Bldg.
New Orleans 12, Louisiana

---

42 **Deputy Commissioner's Exhibit #2**

Received
Apr 16, 1959
District No. 7

BUREAU OF EMPLOYEES' COMPENSATION
SEVENTH COMPENSATION DISTRICT

Case No. 434-328

In the Matter of the Claim for Compensation under the Longshoremen's & Harbor Workers' Compensation Act

Minus Aizen, *Claimant*

versus

Avondale Marine Ways, Inc.
Employer (Self-insured)

STIPULATION OF FACT

It is hereby stipulated and agreed by and between the claimant, Minus Aizen (hereinafter referred to as "Aizen") and Avondale Marine Ways, Inc., a Louisiana corporation having its principal offices at Avondale, Louisiana (hereinafter referred to as "Avondale"), reserving unto each party the right to object to any of the stipulations hereinafter made on the grounds of relevancy, materiality and admissibility, that:

1.

Avondale owns and operates two shipyards in the vicinity of New Orleans, Louisiana. The first of the yards is at Avondale, Louisiana, where a majority of the business performed is fabrication of machinery and structural steel and the new construction of vessels. Repair work on
43 vessels is also performed at this yard, which is situated on the Missippissi River and has launching ways leading into the river. The other yard owned and operated by Avondale is situated at Harvey, Louisiana. At the latter yard repair work on vessels is the principal work performed.

Avondale employs approximately two thousand employees engaged in manual labor and approximately five hundred in administrative, engineering and supervisory functions.

2.

Aizen was first employed by Avondale on July 2, 1952. He was separated on January 7, 1953. He went back to work for Avondale on December 12, 1955 and worked continuously until August 11, 1956 when he sustained the injuries hereinafter described. During the entire term of his employments by Avondale he worked as a tack welder.

3.

During the entire term of Aizen's employment by Avondale, he worked solely on new construction, that is construction of new watercraft, and performed no work on repair jobs. All work performed by Aizen was performed on land with the exception of the work being performed when he sustained the injuries hereinafter referred to.

4.

Notwithstanding that Aizen worked solely on new construction and performed no work on repair jobs,
44 other workmen in particular crafts assigned to work on repair of vessels did on rare occasions perform work on new construction of vessels when there was no work for them to do on repair of vessels and when their services were needed on new construction. In these cases, as soon as the services of the particular workmen were

needed on repair of vessels, or as soon as the need for their services was terminated on new construction, they returned to work on repair of vessels. The same is true for warkmen engaged in new construction of vessels to a lesser degree because new construction is susceptible of being planned more than and fluctuates less than repair work.

5.

On or about April 16, 1956, Avondale commenced the construction of an elevated deck drilling barge under a fixed price contract, which had been negotiated sometime prior thereto with Delta Offshore Drilling Company. The keel on the barge was laid on April 16, 1956. It was launched in an uncompleted state on July 26, 1956. Immediately after the launching it was towed by tugs not owned, operated or controlled by Avondale, but owned, operated and controlled by an independent contractor to a fitting dock approximately two hundred feet from the launching ways and within the confines of the Avondale plant for completion. The barge was completed on November 17, 1956 and was delivered on that date to its owners by Avondale.

6.

The barge described above was a non-self-propelled submersible drilling barge intended for use in offshore oil operations and at the time of Aizen's injuries, was lying afloat at the fitting dock of Avondale's plant at Avondale on the navigable waters of the United States, to-wit, the Mississippi River.

7.

On August 11, 1956 the construction of the barge was completed to the extent of fifty-seven per cent, both in man hours expended and to be expended, and in dollar value expended and to be expended, all as will appear by reference to the exhibit annexed hereto dated December 31, 1958 and prepared by C. W. Ferguson of Avondale's Cost Analysis Branch.

8.

On August 11, 1956 while Aizen was employed as a tack welder working on the completion of the drilling barge

described above, he fell from the superstructure, striking the pontoon on which the barge was floating and thence fell into the water. He sustained extensive severe and permanent and totally disabling injuries at the result of his fall. There is attached hereto as Exhibit B a summary of the injuries sustained by him, prepared by Dr. Howard Karr under date of August 11, 1956 and August 8, 1957 and by Dr. G. C. Battalora, dated April 25, 1957 and November 7, 1957.

9.

At the time that he sustained his injuries Aizen's
46 average weekly earnings were $89.32 and if entitled to any award he is entitled to the maximum weekly compensation benefits available to him under the law.

10.

Avondale had immediate notice of Aizen's injuries and forthwith commenced paying him a benefit of $35.00 per week, the maximum amount of compensation allowable under the Louisiana State Workmen's Compensation Act. Since the date of his injury and up to the present date Avondale has paid Aizen $35.00 per week by checks which clearly showed on their face that they represented compensation under the State Compensation Act. No deductions for Social Security, Unemployment, or Withholding Taxes were made from those checks.

11.

In addition to his weekly compensation benefits Avondale also has paid the approximate sum of $7,000.00 in doctors', hospital and other medical expenses for account of Aizen.

12.

In addition to the weekly compensation benefits paid to Aizen and the medical payments made for his treatment as aforesaid, Avondale has also advanced to him the amount of $3,830.00 by checks of varying amounts and at varying times since he sustained his injuries. The advances were made to Aizen at his request in order
47 to aid him because of his statement that he was in

financial difficulties. All checks were clearly marked "advance on compensation" and were subject to no deduction of any kind.

13.

Avondale filed no notice of the accident with the Deputy Compensation Commissioner until instructed to do so on November 29, 1958 when such notice was filed pursuant to written instructions from the Deputy Commissioner and a copy of the instructions is annexed hereto as Exhibit C.

14.

Avondale has qualified as a self insured under the United States Longshoremen's & Harbor Workers' Compensation Act.

/s/ Charles Kohlmeyer, Jr.
Charles Kohlmeyer, Jr.

/s/ H. Martin Hunley, Jr.
H. Martin Hunley, Jr.

Lemle & Kelleher
1836 National Bank of
Commerce Bldg.
New Orleans, Louisiana

Attorneys for Avondale Marine Ways, Inc.

/s/ Samuel Gainsburgh
Samuel Gainsburgh
1746 National Bank of
Commerce Bldg.
Attorney for Minus Aizen

48 U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
SEVENTH COMPENSATION DISTRICT

Case No. 434-328

In the Matter of the Claim for Compensation under the Longshoremen's & Harbor Workers' Compensation Act

MINUS AIZEN, *Claimant*

vs.

AVONDALE MARINE WAYS, INC.
Self-Insured Employer

Compensation Order Award of Compensation by the Deputy Commissioner—Jan. 27, 1960

Such investigation in respect to the above entitled claim having been made as is considered necessary, as stipulation of facts having been submitted by the interested parties, and a hearing having been duly held in conformity with law the Deputy Commissioner makes the following

FINDINGS OF FACT:

That on the eleventh day of August, 1956, the claimant above named was in the employ of the employer above named, at Avondale, in the State of Louisiana, in the Seventh Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the liability of the employer for compensation under the said Act was insured by itself as a self-insured employer;

That the business of the employer includes the operation of two shipyards in the vicinity of New Orleans,
49 Louisiana; that the first of the two shipyards is located at Avondale, Louisiana, where a majority of the business performed is fabrication of machinery and structural steel and the new construction of vessels; that repair work on vessels is also performed at this yard which is situated on the Mississippi River and has launching ways leading into the river; that the second of the two shipyards is situated at Harvey, Louisiana, where repair work on vessels is the principal work performed; that the em-

ployer employs approximately two thousand employees engaged in manual labor and approximately five hundred employees engaged in administrative, engineering, and supervisory functions; that the employer has a number of employees at both plants who are employed in maritime employment upon the navigable waters of the United States;

That the claimant, Minus Aizen, was first employed by the employer on July 2, 1952 and continued in such employment until January 7, 1953, on which latter date his services were terminated; that the claimant was re-employed by the employer on December 12, 1955 and continued in such employment to and including August 11, 1956, on which latter date he sustained injuries hereinafter described;

That on or about April 16, 1956, the employer commenced construction of a drilling barge for Delta Offshore Drilling Company; that the keel on the barge was laid on April 16, 1956; that the barge was launched on July 26, 1956 and immediately following the launching was towed to a fitting deck approximately two hundred feet from the launching ways, and within the confines of the Avondale plant; that the barge was completed on November 17, 1956; that the barge described above was a drilling barge, intended for use in offshore oil operations, and at the time of the claimant's injury on August 11, 1956, was lying afloat at the fitting dock of the Avondale plant, on the Mississippi River;

That on August 11, 1956, the claimant, Minus Aizen, while performing service for the employer as a tack welder aboard the barge described above, which was then afloat on navigable waters of the United States, sustained personal injury resulting in his disability when he fell from the superstructure, striuking the pontoon on which the barge was floating, and then falling into the Mississippi River, as a result of which he suffered severe multiple injuries; that the injury arose out of and in the course of the employment; that this claim comes within the jurisdiction of the Bureau of Employees' Compensation, United States Department of Labor, in the administration of the Longshoremen's and Harbor Workers' Compensation Act;

That written notice of the injury was not given to the employer within thirty days but that the employer had knowledge of the injury has not been prejudiced by the lack of written notice; that the employer furnished
51 the claimant with all medical, surgical and hospital treatment and care required to April 16, 1959, the date on which the stipulation of facts were filed with the Deputy Commissioner; that the employer is liable for all medical, surgical and hospital treatment and care required by the claimant, as a result of the injury of August 11, 1956; that the average weekly wage of the claimant at the time of the injury amounted to the sum of $89.32;

That as a result of the injury sustained on August 11, 1956, the claimant was wholly disabled beginning August 12, 1956; that such disability is permanent; that for such permanent total disability the claimant is entitled to receive compensation at the maximum rate of $54.00 per week, beginning August 12, 1956 and continuing; that accrued compensation for permanent total disability from August 12, 1956 to January 23, 1960, inclusive, 180 weeks at the rate of $54.00 per week, amounts to $9,720.00; that the employer has paid compensation to the claimant under the provisions of the State of Louisiana Compensation Act in the sum of $6,300.00 for the period August 12, 1956 to January 23, 1960, inclusive, 180 weeks at the rate of $35.00 per week, and has also made advance payments to the claimant in the sum of $3,830.00, or a total payment of $10,130.00.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

AWARD

That the self-insured employer, Avondale Marine
52 Ways, Inc., Avondale, Louisiana, shall pay to the claimant, Minus Aizen, 601 Magnolia Street, Thibodaux, Louisiana, compensation for permanent total disability from August 12, 1956 to January 23, 1960, inclusive 180 weeks at the rate of $54.00 per week, in the sum of $9,720.00. The employer, having previously paid compensation to the claimant in the sum of $10,130.00, shall be entitled to credit for advance payment in the sum of $410.00 at the rate of $54.00 per week; that such advance

payment will be liquidated with payment in the sum of $6.57 on March 17, 1960, inclusive, and beginning March 18, 1960, payments shall continue for permanent total disability at the rate of $54.00 per week, payable in bi-weekly installment, subject to the limitations of the Act, or until further order of the Deputy Commissioner.

That the self-insured employer shall furnish the claimant with all medical, surgical and hospital treatment and care that may be required by the claimant as a result of the injury of August 11, 1956.

A fee for legal services rendered the claimant in connection with this case is approved in favor of Attorney Samuel C. Gainsburgh of the law offices of Raymond H. Kierr, 1746 National Bank of Commerce Building, New Orleans 12, Louisiana, in the sum of $500.00, such sum to constitute a lien upon future payments in the manner outlined below;

A fee for legal services rendered the claimant in
53 connection with this case is approved in favor of Attorney Wollen J. Falgout, 205 West Fifth Street, Thibodaux, Louisiana, in the sum of $200.00, such sum to constitute a lien upon future payments in the manner outlined below:

From each bi-weekly payment, beginning March 18, 1960, in the amount of $108.00, the sum of $10.00 shall be paid to Attorney Gainsburgh and the sum of $5.00 shall be paid to Attorney Falgout until the respective liens have been paid.

Given under my hand at New Orleans, Louisiana, this 27th day of January, 1960.

/s/ P. J. Donovan
Deputy Commissioner
Seventh Compensation District

54 IN THE UNITED STATES DISTRICT COURT

Minute Entry of Hearing on Motion of Defendant to Dismiss Complaint and on Motion of Defendant for Summary Judgment: Hearing on Motion of Plaintiff for Summary Judgment: Argument: and Submission—May 11, 1960

This cause came on for hearing this day on motion of Defendant, P. J. Donovan, to dismiss complaint, and on motion of Defendant, Minus Aizen, for Summary Judgment, and on motion of Plaintiff, Avondale Marine Ways, Inc., for Summary Judgment under Rule 56.

PRESENT: H. Martin Hunley, Esq.,
Attorney for Plaintiff
Francis G. Weller, Esq.,
Assistant U. S. Attroney
for P. J. Donovan, Defendant

Samuel C. Gainsburgh, Esq.,
Attorney for Minus Aizen, Deft.

---

55 Argument.
Submitted.

IN THE UNITED STATES DISTRICT COURT

Order Granting Motion of Defendant, P. J. Donovan, to Dismiss Complaint: Order Granting Motion of Defendant, Minus Aizen, for Summary Judgment: and Order Denying Motion of Plaintiff for Summary Judgment—Oct. 10, 1960

This cause came on at a former day to be heard on the motion of defendant, P. J. Donovan, Deputy Commissioner, U. S. Department of Labor, to dismiss the complaint herein, as well as on the motion of the defendant, Minus Aizen, for summary judgment herein, and on the motion of plaintiff, Avondale Marine Ways, Inc., for summary judgment and was argued by counsel for the respective parties and submitted when the court took time to consider:

Whereupon and on due consideration thereof,

IT IS ORDERED BY THE COURT that the motion of the defendant, P. J. Donovan, Deputy Commissioner, U. S. Department of Labor, to dismiss the complaint be and the same is hereby, GRANTED.

It Is Further Ordered By the Court that the motion of the defendant, Minus Aizen, for summary judgment is treated by the court as a Motion to Dismiss, and said motion is hereby, Granted.

56 It Is Further Ordered By the Court that the motion of the plaintiff, Avondale Marine Ways, Inc., for summary judgment be and the same is hereby, Denied.

H.W.C.

IN THE UNITED STATES DISTRICT COURT

Judgment—October 10, 1960

This cause having been heard at a former day, on the motion of the defendants for summary judgment, and the court, after due consideration thereof, having granted said motion;

It Is Ordered, Adjudged and Decreed that judgment be, and is hereby entered, in favor of the defendant, P. J. Donovan, Deputy Commissioner, Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, and Minus Aizen, defendants, and against the plaintiff, Avondale Marine Ways, Inc., dismissing this suit, with costs.

H.W.C.

IN THE UNITED STATES DISTRICT COURT

Notice of Appeal—Filed November 18, 1960

Notice is hereby given that plaintiff Avondale Shipyards, Inc. hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment en-
57 tered in this action on October 25, 1960, denying plaintiff's motion for summary judgment and granting motion to dismiss of defendant, P. J. Donovan, Deputy

Commissioner, and granting motion for summary judgment of defendant Minus Aizen.

/s/ Charles Kohlmeyer, Jr.
Charles Kohlmeyer, Jr.

Lemle & Kelleher
Of Counsel

/s/ H. Martin Hunley, Jr.
H. Martin Hunley, Jr.
National Bank of Commerce Building
New Orleans 12, Louisiana

Attorneys for Avondale Shipyards, Inc.

---

60 **Clerk's Certificate** to Foregoing Transcript
(Omitted in printing)

---

61 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18695

Avondale Shipyards, Inc.

versus

P. J. Donovan, Deputy Commissioner, Seventh Compensation District, Bureau of Employees' Compensation U. S. Department of Labor, and Minus Aizen

Argument and Submission—May 1, 1961

On this day this cause was called, and after argument by Charles Kohlmeyer, Esq., for appellant and David L. Rose, Esq., Attorney Department of Justice, for appellees, was submitted to the Court.

62 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18695

AVONDALE SHIPYARDS, INC., *Appellant*,

versus

P. J. DONOVAN, Deputy Commissioner Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor and MINUS AIZEN, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Opinion—July 13, 1961

Before CAMERON, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: This case presents for decision the identical question this day decided in *The Travelers Ins. Co. v. Calbeck, Deputy Commissioner*, 5 Cir., 1961, ... F. 2d ...., ... AMC .... [No. 18802], whether in-
63 juries received by a person working on an uncompleted vessel, launched and afloat but still under construction, are covered under the State or the Federal Longshoremen's Act.

The facts are not significantly different. The Employer, Avondale Marine Ways, Inc., has two large shipyards and regularly performs new construction work and repair work. Generally in the Employer's large labor force the work performed by a particular employee was primarily one rather than the other. Occasionally an employee would perform the other. The injured employee, however, worked regularly and solely in new construction. The injuries were received on August 11, 1956, while the employee was working as a welder on an uncompleted elevated deck drilling barge. The hull had been launched July 26, 1956, but

the vessel was not completed and delivered until November 17, 1956. By stipulation the barge, at the time of the accident, was 57% complete based both on probable dollar cost and estimated man hours of work.

Unlike the *Calbeck* case only one Award was issued here. On January 27, 1960, Deputy Commissioner Donovan entered an Award of compensation benefits under the Longshoremen's Act. This was, of course, subsequent to the two Orders of Deputy Commissioner Calbeck in the other similar case then pending before the Bureau of Employees' Compensation, but it was prior to the District Court's Order of April 20, 1960, which remanded the matter for further proceedings and resulted in a complete about-face. See note 5 in *Calbeck*, ... F. 2d ..... at ..... The uncertainty and confusion was, therefore, being generated by the two cases themselves.

64 As in the other case, we hold that injuries to such a worker may validly be covered by the State Compensation Act. Consequently, the Order of the Deputy Commissioner must be set aside as not in accordance with law, 33 USCA § 921(b).

This makes it unnecessary to pass on the additional contention of the Employer that payments aggregating several thousand dollars for compensation and medical expense ostensibly made under the Louisiana Act constituted such an administrative determination as to be within that aspect of *Davis* v. *Department of Labor*, 1942, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653.

REVERSED AND RENDERED.

---

65 No. 18695

AVONDALE SHIPYARDS, INC.,

versus

P. J. DONOVAN, Deputy Commissioner Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, and MINUS AIZEN.

Judgment—July 13, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the

Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for appellant, Avondale Shipyards, Inc.

---

69 **Clerk's Certificate** to Foregoing Transcript
(Omitted in Printing)

---

70 SUPREME COURT OF THE UNITED STATES

No. 532, October Term, 1961

C. D. CALBECK, DEPUTY COMMISSIONER, ETC., ET AL.
Petitioners,

vs.

TRAVELERS INSURANCE COMPANY, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 3d, 1961.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 5th
day of October 1961.

71 SUPREME COURT OF THE UNITED STATES

No. 532, October Term, 1961

C. D. CALBECK, DEPUTY COMMISSIONER, ETC., ET AL.,
Petitioners,

vs.

TRAVELERS INSURANCE CO., ET AL.

Order Allowing Certiorari—Filed December 18, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962—626242/P O 856